Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1161

SAINT JOSEPH'S HOSPITAL HEALTH CENTER,
Petitioner,

v.

BLUE CROSS OF CENTRAL NEW YORK, INC., SERVICE EMPLOYEES INTERNATIONAL UNION AFL-CIO and JOSEPH A. CALIFANO, JR., as Secretary of the United States Department of Health, Education and Welfare,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

Supreme Court of the United States

OCTOBER TERM, 1979

No.

SAINT JOSEPH'S HOSPITAL HEALTH CENTER,
Petitioner,

v.

BLUE CROSS OF CENTRAL NEW YORK, INC., SERVICE EMPLOYEES INTERNATIONAL UNION AFL-CIO and JOSEPH A. CALIFANO, JR., as Secretary of the United States Department of Health, Education and Welfare,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Saint Joseph's Hospital Health Center, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on November 26, 1979.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto (A-2). The opinion of the United States District Court for the Northern District of New York, not yet reported, appears in the Appendix hereto (A-4).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on November 26, 1979 (A-3). This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does 42 U.S.C. §1306 provide the requisite statutory authority for public disclosure by the United States Department of Health, Education and Welfare of the annual financial report and schedules filed with it by St. Joseph's Hospital where such financial reports and schedules would otherwise be protected from disclosure by 18 U.S.C. §1905?

2. Even if the regulations by which the Secretary of HEW purports to authorize disclosure of St. Joseph's financial reports and schedules were statutorily authorized by 42 U.S.C. §1306, is it nonetheless an abuse of discretion to release these reports in contravention of 18 U.S.C. §1905?

STATUTORY PROVISIONS INVOLVED

The texts of the following materials relevant to the determination of this petition are set forth in the Appendix:

Trade Secrets Act, 18 U.S.C. §1905 (A-36).

Social Security Act, 42 U.S.C. §1306 (A-36).

N.Y. Public Health Law §2805-b (McKinney's, 1976) (A-39).

Regulations

20 C.F.R. §422.435 (A-37).

10 N.Y.C.R.R. §§400.7, 405.22 (A-38).

STATEMENT OF CASE

This is an action for injunctive and declaratory relief. Jurisdiction of the United States District Court for the Northern District of New York was invoked pursuant to the provisions of Title 28 U.S.C., Section 1331 and Title 5 U.S.C., Section 701 *et. seq.* The conduct sought to be enjoined is disclosure by Blue Cross of St. Joseph' financial reports known as "1978 Uniform Financial Reports and Schedules of SSA-2552" which were filed by St. Joseph's Hospital in compliance with requirements of the Federal Medicare program. At issue is the validity of regulations promulgated by the Secretary of HEW which purport to make available to the public generally such reports filed by St. Joseph's. A temporary injunction restraining disclosure of the report pending determination of the motion for a preliminary injunction was granted. HEW then moved to dismiss the complaint and the District Court granted the motion.

St. Joseph's appealed the dismissal of the complaint to the U.S. Court of Appeals for the Second Circuit. The Second Circuit affirmed the decision of the District Court holding that the regulation calling for the disclosure of the reports, 20 C.F.R. §422.435, was validly promulgated, and that the disclosure thereby provided was a proper exercise of the discretion granted to the Secretary of HEW under 42 U.S.C. §1306(a). An order enjoining disclosure of the report for thirty days or until determination by this Court under 28 U.S.C. §2101(f) and pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure was sought by motion dated November 29, 1979, and scheduled for hearing on December 11, 1979. By an order dated and entered on the 28th day of December, 1979, the United States Court of Appeals for the Second Circuit stayed the issuance of its mandate, pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, pending the petitioner's application to this Court for a writ of certiorari.

St. Joseph's Hospital is a voluntary, non-profit hospital licensed under the laws of the State of New York. Among its patients are persons whose health care costs are covered by the Medicare program, Title XVIII of the Social Security Act, 42 U.S.C. §1395 *et. seq.* Blue Cross acts as a fiscal intermediary for HEW and reimburses St. Joseph's for the costs it incurs in providing services covered by the Medicare program.

Under New York law, St. Joseph's must provide hospital services to persons covered by the Medicare program. N.Y.S. Hospital Code 10 NYCRR §§400.7, 405.22. To enable it to receive reimbursements under the Medicare program, St. Joseph's is required to submit to Blue Cross annually, on forms prescribed by it and HEW, certain cost reports known as Uniform Financial Report and Schedules of SSA-2552. Such financial reports, among other things, include a detailed breakdown and departmental allocation of plaintiff's costs and revenues for the preceding fiscal year. In June of 1979, the Union, which was attempting to organize St. Joseph's employees, requested a copy of St. Joseph's 1978 financial report from Blue Cross which, despite St. Joseph's protests, notified St. Joseph's that the report would be made available to the Union on or after June 21, 1979. St. Joseph's thereupon commenced its action.

REASONS FOR GRANTING THE WRIT

I. The decision of the Second Circuit is in conflict with Decisions of District Courts which are currently on appeal to other United States Courts of Appeals regarding the relationship of 42 U.S.C. §1306 to 18 U.S.C. §1905 and the proper scope of HEW Regulation 20 C.F.R. §422.435.

The Trade Secrets Act, 18 U.S.C. §1905 is a criminal statute which makes it illegal for any employee of a United States department or agency to disclose:

> "... to any extent not authorized by law any information coming to him in the course of his employment or official duties ... or (any) report or record made to or filed with such department ... which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm ... corporation, or association ..."

The regulation promulgated by HEW, 20 C.F.R. §422.435, provides in part as follows:

> "The following shall be made available to the public under the conditions specified: ...
>
> (c) Upon a request in writing, cost reports submitted by providers of services pursuant to Section 1815 of the Act to enable the Secretary to determine amounts due such providers."

This Court has determined that such substantive disclosure regulations promulgated by an agency of government without clear Congressional grant of legislative authority are not sufficient "authoriz[ation] by law" within the meaning of 18 U.S.C. §1905. *Chrysler Corporation* v. *Brown*, ____ U.S. ____, 99 S. Ct. 1705 (1979) (hereinafter *Chrysler*).

42 U.S.C. §1306 provides in pertinent part:

> " (a) No disclosure of . . . any file, record, report or other paper, or any information, obtained at any time by the Secretary of Health, Education, and Welfare . . . in the course of discharging [his] respective duties under this chapter . . . shall be made except as the Secretary of Health, Education, and Welfare . . . may by regulations prescribe . . ."

In reliance upon 42 U.S.C. §1306, the Second Circuit has herein held that the statute provides the requisite legislative authorization to validate the HEW regulation here at issue. Thus, according to the Second Circuit herein, 20 C.F.R. §422.435 brings the release of the medical provider cost reports within the "authorized by law" exception to §1905 of Title 18 (A-2).

The Second Circuit interpretation of 18 U.S.C. §1905 conflicts with that adopted by the United States District Court for the Eastern District of Tennessee as announced in *Parkridge Hospital, Inc.* v. *Blue Cross and Blue Shield of Tennessee*, 430 F. Supp. 1093 (E.D. Tenn. S.D. 1977). Although the *Parkridge* case is not a Circuit Court decision, the district court determination is currently on appeal to the Sixth Circuit and was argued in November of 1979 (77-1576, decision pending).

Although the *Parkridge* case was decided prior to this Court's decision in *Chrysler, supra*, the *Parkridge* case was decided along a *Chrysler*-type analysis. The *Parkridge* court held that while 42 U.S.C. §1306 might serve as statutory authority for the HEW regulation (20 C.F.R. §422.435), certainly there was no authorization to promulgate a regulation which was in derogation of 18 U.S.C. §1905. The court indicated that the regulation, by being in derogation of §1905, constituted an abuse of the Secretary's discretion in that no legislative authority was given to limit the scope of 18 U.S.C. §1905. Thus, there is a conflict between the *Parkridge* approach and the decision of the Second Circuit.

Another district court decision, currently on appeal to the Sixth Circuit, adopts the *Parkridge* approach. *(The Diplomat-Lakewood, Inc.* v. *Blue Cross of Northeast Ohio,* N.D. Ohio No. C77-718, Appeal No. 78-3171). The *Diplomat* court held that:

> ". . . a relaxation of the prohibitions of 18 U.S.C. section 1905 through the 'authorized-by-law' language of section 1905 cannot be accomplished through the secretary's exercising of his authority to adopt regulations pursuant and relating to section 1306(a) . . .
>
> Section 1306(a) does not extend authority to the secretary to adopt a regulation having the force of law that would remove the prohibitions of §1905."

(*Diplomat, supra*, at p. 21).

The *Diplomat* court held that it would constitute a violation of 18 U.S.C. §1905 if the Secretary were permitted to apply regulation 422.435 to release the cost reports and that such a release would be an abuse of discretion on the part of the Secretary. Thus, the Second Circuit is also in conflict with the district court in *Diplomat*. (A copy of the unreported *Diplomat* decision is appended hereto for the convenience of the Court) (A-58).

Further conflict exists between the Second Circuit and another unreported case currently on appeal in the Sixth Circuit. In *Laughlin Memorial Hospital* v. *Blue Cross and Blue Shield of Tennessee, et al.*, (E.D. Tenn. No. 1-77-318, January 18, 1978, Appeal No. 78-1159, decision stayed pending the Sixth Circuit decisions in *Parkridge, supra*, and *Diplomat-Lakewood, supra*), the court followed and reaffirmed its decision in *Parkridge, supra*, and granted a permanent injunction, enjoining the release of the provider cost reports there at issue.

Disclosure was also enjoined in the following unreported cases: *Psychiatric Institute of Washington, D.C., Inc.* v. *Group Hospitalization, Inc., et al.*, (D.D.C. No. 78-220, March 30, 1978)

(currently on appeal to the D.C. Circuit Court, No. 78-1645) (A-81); *Circle Terrace Hospital Corp.* v. *Group Hospitalization, Inc., et al.*, (E.D. Va. No. 77-487-A, September 7, 1977) (currently on appeal to the Fourth Circuit, No. 78-1071, decision stayed pending Fourth Circuit determination of *Humana of Virginia, Inc.* v. *Blue Cross of Virginia*, 455 F. Supp. 1174 [E.D. Va. 1974] [currently on appeal to the Fourth Circuit, argued January 8, 1980, decision pending, Appeal No. 78-1875]).

Although issues involving collective bargaining and labor relations were raised by the Petitioner at both the district court and the Second Circuit herein, both courts refused to treat these issues. In so doing, the Second Circuit is in conflict with the court in *Psychiatric Institute, supra.*

In *Psychiatric Institute, supra*, the court held that release of the cost reports to the union would prejudice the competitive position of the provider. In discussing the impact of such a release upon the collective bargaining process, the court reiterated the well-established rule that "it is a fundamental tenet of national labor relations law that management does not have to provide labor with cost and profit figures so long as the employer has met its duty to bargain in good faith . . ."

In addition the court emphasized that it could not be said that Congress meant to overrule the traditional approach "*sub silentio* via the enactment of a law in a field normally unrelated to labor disputes."

Other cases which have been decided in the district courts subsequent to this Court's decision in *Chrysler, supra*, are in direct conflict with the Second Circuit decision herein. In *Washington Hospital Center* v. *Mutual of Omaha*, (D.D.C., June 25, 1979, No. 78-2485) (A-40), the court held that "42 U.S.C. §1306 does not provide the requisite statutory authorization for the release by HEW — pursuant to 20 C.F.R. §422.435 — of material which would otherwise be protected by 18 U.S.C. §1905, because

(a) the legislative history of . . . §1306(a) indicates no congressional intent to limit the normal applicability of . . . §1905 . . ." The *Washington Hospital* case is also in conflict with the Second Circuit decision herein with regard to the permissible scope of 20 C.F.R. §422.435. While the D.C. district court would limit the disclosure of information released pursuant to 42 U.S.C. §1306, to "such information as does not fall within the scope of 18 U.S.C. §1905", the Second Circuit would give unbridled discretion to the Secretary to disclose as [he] sees fit.

In *Hospital Affiliates International, Inc., etc., et al.* v. *Califano, etc., et al.*, (N.D. Ill. E.D., September 28, 1979, No. 77C 3088) (A-44), the court held that §1306 of Title 42 did not grant express authority to disclose by regulation what otherwise would be protected by 18 U.S.C. §1905. Relying upon *Washington Hospital, supra*, the district court held that there was no indication in the legislative history of 42 U.S.C. §1306 that Congress meant to limit 18 U.S.C. §1905.

Although neither *Washington Hospital, supra*, nor *Hospital Affiliates, supra*, has been appealed as of this date, the decisions were adverse to the government and the time for appeal has not yet expired. Due to time constraints involving the Petitioner's stay in the Second Circuit and the time constraints imposed by U.S. Sup. Ct. Rule 22(1), the Petitioner may not await possible action in these cases.

The only other Circuit Court to have considered the issues involved herein is in accord with the Second Circuit. (*St. Mary's Hospital, Inc.* v. *Harris*, 462 F. Supp. 315, aff'd 604 F. 2d 407 [1979]).

While there is at present no direct conflict between the Circuit Courts of Appeals on these issues, there is a substantial body of opinion in the several district courts contrary to the decision of the Second Circuit Court of Appeals in this matter.

The time constraints imposed by the Second Circuit in granting a stay of the mandate does not permit the Petitioner to await further decisions on the pending appeals in other circuits. The conflicts in the litigation to date merit review by the Supreme Court.

II. The decision below would destroy confidentiality and collective bargaining rights of private health care providers and cause unwarranted harm to them as well as to the public interest.

By unconditional and indiscriminate disclosure to the public of records which contain comprehensive financial and operational data filed by health care providers, HEW has effectively stripped them of their status as private entities without benefit of Congressional pronouncement. In this case the hospital cannot elect to preserve the privacy of its records. All hospitals must file the cost reports in order to receive reimbursement and the New York public health commissioner has promulgated regulations requiring all general hospitals in New York State to participate in the Medicare program (N.Y.S. Hospital Code, 10 NYCRR §§400.7, 405.22 set forth at pp. 38-39 of the appendix herein). Moreover, as a practical matter, section 2805-b of the New York Public Health Law which prohibits any questioning of a person in need of immediate hospitalization concerning the source of payment for hospital services rendered (A-39) effectively deprives the hospital of any choice in the matter.

That there has been a multiplicity of actions involving disclosure to the public of the cost reports required to be submitted to HEW has been shown above. As demonstrated by the earlier cases, HEW initially attempted to resist requests for disclosure. See *Stretch* v. *Weinberger*, 495 F.2d 639 (3d Cir. 1974); *Schechter* v. *Weinberger*, 506 F.2d 1275 (D.C. Cir. 1974); *People of the State of California* v. *Weinberger*, 505 F.2d 767 (9th Cir. 1974). More recently, however, it has reversed its position, arguing in substance that while disclosure *may* cause harm to

the providers, the cost reports are "public records about public business, involving the expenditure of public funds" which should be disclosed to the public. See *Westchester General Hospital* v. *Department of Health, Education & Welfare*, 464 F. Supp. 236, 257 (M.D. Fla. 1979). This argument erroneously assumes that providers of health care are in a practical sense public corporations who do not compete with each other and overlooks the economic impact of disclosure in situations where persons who are not health care providers are involved. Some courts have expressly or impliedly accepted the government's rationale.[1] More have not.[2]

Even assuming that health care providers do not compete with each other with the vigor of other segments of private enterprise,

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[1] *Westchester General Hospital* v. *Department of Health, Education & Welfare*, 464 F.Supp. 236, 257 (M.D. Fla. 1979); *St. Mary's Hospital, Inc.* v. *Harris*, 604 F.2d 407 (5th Cir. 1979); *Doctors Hospital of Sarasota* v. *Califano*, 455 F.Supp. 476 (M.D. Fla. 1978); *Cedars Nursing & Convalescent Center, Inc.* v. *Aetna Life and Casualty Insurance Co.*, 472 F.Supp. 296 (E.D. Pa. 1979).

[2] *Humana of Virginia, Inc.* v. *Blue Cross of Virginia*, 455 F.Supp. 1174 (E.D. Va. 1978) (appeal argued in 4th Circuit 1/8/80, No. 78-1857); *Parkridge Hospital, Inc.* v. *Blue Cross and Blue Shield of Tennessee*, 430 F.Supp. 1093 (E.D. Tenn. 1977) (Appeal to 5th Circuit argued in November, 1979, No. 77-1576); *McCoy* v. *Weinberger*, 386 F.Supp. 504 (W.D. Ky. 1974); *The Diplomat Lakewood, Inc.* v. *Blue Cross of Northeast Ohio*, (N.D. Ohio No. C77-718, 11/25/77, A-58) (appeal to 6th Circuit argued 11/29/79, No. 78-3171); *Psychiatric Institute of Washington, D.C.* v. *Group Hospitalization, Inc.*, (D.D.C. No. 78-220 3/30/78, A-81) (currently on appeal to the D.C. Circuit, No. 78-1645); *St. Anthony's Medical Center, Inc.* v. *Califano*, (S.D. Ind. No. 79-171-C 10/19/79) (appeal to 7th Cir. filed); *Hospital Affiliates International, Inc.* v. *Califano*, (N.D. Ill. No. 77-3088 1/28/79, A-44), (not yet appealed); *Washington Hospital Center* v. *Mutual of Omaha*, (D.D.C. No. 78-2485 6/25/79, A-40) (not yet appealed); *Circle Terrace Hospital Corporation* v. *Group Hospitalization, Inc.*, (E.D. Va. No. 77-487-A 9/7/77) (appealed to 4th Circuit No. 78-1071 and matter stayed pending determination of *Humana, supra*); *Laughlin Memorial Hospital, Inc.* v. *Blue Cross and Blue Shield of Tennessee*, (E.D. Tenn. No. 1-77-318 1/18/78) (appealed to 6th Circuit No. 78-1159 and matter stayed pending determination of *Parkridge, supra*).

the harm to be anticipated by indiscriminate disclosure is real and substantial and inimical not only to the provider's interests but that of the public as well. Certainly use of the reports by hopeful vendors impairs a hospital's bargaining position for the cost of services it purchases. For example, from the reports, a possible vendor of security services is able to ascertain what the hospital is presently paying and then tailor its bid or negotiation of a contract rather than being forced to deal at an arms-length basis. The same is true of other specialized services as well as information regarding technical and professional personnel. The reports are replete with instances where the hospital's pay levels for such skilled personnel are easily ascertained, thereby giving other employers in the market place, whether hospitals or companies not burdened with such disclosure regulations, an unwarranted advantage in recruiting employees in whom the hospital has a large investment expended for training and education. In addition, the hospital's reports can be utilized effectively by a union for organizational or collective bargaining negotiations which, if the union is successful, almost inevitably creates higher wages or fringe benefits. The result would be even higher costs to hospitals and higher costs to the public in need of health care services.

It is of equally great importance that disclosure of the reports would deprive the petitioner and other health care providers of fundamental rights accorded them in collective bargaining negotiations. It is well-settled that a union is entitled only to that part of an employer's financial data which is reasonably necessary to represent its employees and this disclosure is only required where the employer claims financial inability. See *National Labor Relations Board* v. *Truitt Manufacturing Co.*, 351 U.S. 149, 76 S.Ct. 753 (1956); *Teleprompter Corp.* v. *NLRB*, 570 F.2d 4 (1st Cir. 1977); *International Woodworkers* v. *NLRB*, 263 F.2d 483 (D.D.C. 1959) (Burger, J.); *Psychiatric Institute of Washington, D.C., Inc.* v. *Group Hospitalization, Inc.*, (D.D.C.

No. 78-220 3/30/78, A-81) (currently on appeal to D.C. Circuit, No. 78-1645).

Finally, it should be emphasized that petitioner does not contend that it would be an abuse of discretion to make available the reports to other properly interested agencies, both state and federal, provided they will also protect petitioner's confidentiality rights. Nor should non-confidential agency information be withheld from the public such as payments made to, and utilization data concerning providers. By so limiting the information to be disclosed, the provider's right to privacy and business confidentiality would be restored and the public's legitimate right of access to governmental information would be preserved.

CONCLUSION

The importance of these questions to the hospital industry and the evident conflict in the litigation to date merit review by the Supreme Court.

Respectfully submitted,

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January 21, 1980

CERTIFICATE OF COUNSEL

STATE OF NEW YORK
COUNTY OF ONONDAGA ss.:

I hereby certify that I have examined the foregoing petition for a Writ of Certiorari and that in my opinion, it is well founded and the cause is one in which the petition should be granted.

_____
Counsel for Petitioner

APPENDIX

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Order Granting Stay

79-6140
#1141

UNITED STATES COURT OF APPEALS
SecondCircuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-eighth day of December, one thousand nine hundred and seventy-nine.

ST. JOSEPH'S HOSPITAL HEALTH CENTER,
Plaintiff-Appellant,

v.

BLUE CROSS OF CENTRAL NEW YORK, INC., SERVICE EMPLOYEES INTERNATIONAL UNION AFL-CIO and JOSEPH A. CALIFANO, JR., as Secretary of the United States Department of Health, Education and Welfare,
Defendants-Appellees.

It is hereby ordered that the motion made herein by counsel for the appellant by notice of motion dated December 10, 1979 to stay issuance of the mandate pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41 (b) F.R.A.P. be and it hereby is granted.

/s/ LEONARD P. MOORE
Leonard P. Moore

/s/ JAMES L. OAKES
James L. Oakes

/s/ JON O. NEWMAN
Jon O. Newman
Circuit Judges

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED
DEC. 28, 1979
A. DANIEL FUSARO, CLERK

Order Appealed From

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of November, one thousand nine hundred and seventy-nine.

Present: Hon. Leonard P. Moore, Hon. James L. Oakes, Hon. Jon O. Newman, *Circuit Judges.*

St. Joseph's Hospital Health Center,

Appellant,

v.

Blue Cross of Central New York, Inc., Service Employees International Union AFL-CIO and Joseph A. Califano, Jr., as Secretary of the United States Department of Health, Education and Welfare,

Appellees.

79-6140

ORDER

This appeal is from the judgment of the United States District Court for the Northern District of New York, Howard G. Munson, Judge, dismissing a complaint by a hospital which is a "provider" of Medicare services under Title XVIII of the Social Security Act, 42 U.S.C. §1395, seeking to enjoin the Secretary of Health, Education and Welfare (HEW) and his fiscal intermediary, Blue Cross of Central New York, from disclosing the hospital's 1978 "cost reports" to a labor union requesting them under the Freedom of Information Act. We affirm substantially on Judge Munson's opinion ruling that the HEW regulation calling for the disclosure of these reports, 20 C.F.R. §422.435, was validly promulgated, and that the disclosure it provides was a proper exercise of the legislative authority granted to the Secretary of HEW in 42 U.S.C. §1306(a). As such the disclosure of these reports is not prohibited by the Trade Secrets Act, 18 U.S.C. §1905, because it is "authorized by law" within the

meaning of that Act as explained in *Chrysler Corp. v. Brown*, ____ U.S. ____, 47 U.S.L.W. 4434 (Apr. 18, 1979).

The decision of Judge Gesell of the United States District Court for the District of Columbia to the contrary in *Washington Hospital Center v. Mutual of Omaha*, No. 78-2485 (May 16, 1979, and June 25, 1979), relies principally on the refusal of Congress in 1972 to adopt an amendment proposed by Senator Ribicoff which the court noted would have clearly authorized the release of the cost reports. S. Rep. No. 1230, 92d Cong., 2d Sess. 305-06 (1972); *id.* at 1274-75; 118 Cong. Rec. 1027 (1972). But the Senator's proposed amendment would have gone further – it would have *mandated* disclosure, and we agree with Judge Munson that the congressional refusal to compel disclosure indicates not an intention to prohibit disclosure but rather an intention to leave that decision to the discretion of HEW. The agency exercised that discretion affirmatively in promulgating its regulation, 20 C.F.R. §422.435.

We note that the Fifth Circuit has agreed with the court below. *St. Mary's Hospital v. Harris*, No. 79-1421 (5th Cir. Oct. 12, 1979) (summary calendar).

/s/ LEONARD P. MOORE
Leonard P. Moore

/s/ JAMES L. OAKES
James L. Oakes

/s/ JON O. NEWMAN
Jon O. Newman
Circuit Judges

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED
NOV. 26, 1979
A. DANIEL FUSARO, CLERK

District Court Motion

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

ST. JOSEPH'S HOSPITAL HEALTH CENTER,

Plaintiff,

v.

BLUE CROSS OF CENTRAL NEW YORK, INC., SERVICE EMPLOYEES INTERNATIONAL UNION AFL-CIO, and JOSEPH A. CALIFANO, JR., as SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE.

Defendants.

Civil Action No. 79CV-416

SIRS:

Please Take Notice that the annexed Motion to Dismiss will be made on June 27, 1979 at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, in the United States District Court, Federal Building, City of Syracuse, New York.

Dated: June 26, 1979

TO: Honorable Joseph R. Scully
Clerk, U.S. District Court
Federal Building
Utica, New York 13503

Bruce Soden, Esquire
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District Court Motion

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MOTION TO DISMISS

The United States of America by its attorney, George H. Lowe, United States Attorney for the Northern District of New York, moves this Court for an Order dismissing the above-captioned case pursuant to Rule 12(b) and for such other relief as is just and proper.

GEORGE H. LOWE
United States Attorney
/s/ GUSTAVE J. DIBIANCO
Gustave J. DiBianco
Assistant U.S. Attorney

District Court Decision

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ST. JOSEPH'S HOSPITAL HEALTH CENTER,

Plaintiff,

vs.

BLUE CROSS OF CENTRAL NEW YORK, INC., SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO AND JOSEPH A. CALIFANO, JR., as SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,

Defendants.

79-CV-416

APPEARANCES:

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HON. GEORGE H. LOWE, UNITED STATES ATTORNEY, Attorney for defendant Califano, 369 Federal Building, Syracuse, NY 13260, OF COUNSEL: GUSTAVE J. DiBIANCO, ESQ., ASSISTANT U.S. ATTORNEY.

HOWARD G. MUNSON, D.J.

District Court Decision

MEMORANDUM-DECISION AND ORDER

This is an action to enjoin agency disclosure in response to a Freedom of Information Act request. The information to be disclosed is arguably exempt from the Act's mandatory disclosure requirements, but a regulation promulgated by the Secretary of Health, Education and Welfare would nevertheless compel its release. St. Joseph's Hospital challenges the validity of this rule, arguing that it is "arbitrary, capricious, an abuse of discretion," and otherwise "not in accordance with the law." The Court's jurisdiction over this dispute is properly founded upon 28 U.S.C. §1331. *See Califano v. Sanders*, 430 U.S. 99 (1977).

St. Joseph's Hospital is a "provider" of medicare services. 42 U.S.C. §1395 et. seq. As a medicare participant, the hospital is reimbursed for these services by the Health Care Finance Administration.[1] However, neither the Health Care Finance Administration nor the Department of Health, Education and Welfare provides payment and accounting services. These functions are performed by Blue Cross of New York.[2]

As a participant in the Medicare program, St. Joseph's Hospital is required to file an annual financial report with Blue Cross and the Department of Health, Education and Welfare. This "cost report" outlines the Hospital's financial standing and details its areas of expenditure during the preceding year. Once submitted, the report, of course, becomes agency data which is subject to disclosure under the Freedom of Information Act.

St. Joseph's Hospital is currently being solicited by organizers of the Service Employees International Union, AFL-CIO.This labor organization hopes to attain recognition as the exclusive bargaining representative of the hospital's nonsupervisory

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[1]On March 8, 1977, responsibility for administration of the Medicare program was transferred from the Social Security Administration to the newly-created Health Care Finance Administration, 42 F.Reg. 13262.

[2]42 U.S.C. §1395h.

employees. Believing that statistics concerning the employer's salary schedules, priorities, and profits would be useful in its organizing campaign, the union has demanded a copy of the 1978 St. Joseph's Hospital "cost report" pursuant to the Freedom of Information Act. H.E.W. regulations authorize full disclosure of this information,[3] and the Secretary promptly notified the Hospital of the Department's intention to comply with the union's request. The present action was then commenced, seeking preliminary and permanent injunctive relief to restrain compliance by either H.E.W. or its agent Blue Cross. This Court granted a temporary restraining order and the government moved to dismiss plaintiff's complaint for failing to state a claim upon which relief could be granted. Since matters outside the pleadings were submitted by the parties, the Court announced its intention to treat the government's motion as one for summary judgment. F.R.Civ.P. 12(b).

The 1978 St. Joseph's Hospital cost report contains, among other things, a balance sheet, a profit and loss statement, a schedule allocating each cost item to a revenue producing department, a schedule setting forth the revenues and costs of each department, and schedules showing out-patient revenues, hospital based physician remuneration, employee benefits and administrative costs. Plaintiff argues that the Freedom of Information Act, 5 U.S.C. §552, prohibits disclosure of this information because it is exempted by 5 U.S.C. §552(b)(4). As noted

[3]20 C.F.R. §422.435(c) provides:

> The following shall be made available to the public under the conditions specified:
>
> • • •
>
> (c) Upon request in writing, cost reports submitted by providers of services pursuant to section 1815 of the Act to enable the Secretary to determine amounts due such providers.

below, the exemptions contained in the Freedom of Information Act do not themselves forbid voluntary compliance with a "FOIA" request. The Court must therefore address plaintiff's argument that the H.E.W. regulation mandating disclosure of medicare provider "cost reports" contravenes the Trade Secrets Act — a provision in Title 18 which broadly prohibits government disclosure of commercial or financial information, except as otherwise authorized by law. 18 U.S.C. §1905.

The United States Supreme Court has recently stated that administrative regulations may exempt agency disclosure from the prohibition of 18 U.S.C. §1905 if (a) the regulations are substantive in nature, (b) the disclosure which they authorize is contemplated by a grant of congressional authority, and (c) the requisite procedural formalities were observed during their promulgation. *Chrysler Corp. v. Brown*, ____ U.S. ____, 47 U.S.L.W. 4434 (1979). Inasmuch as 20 C.F.R. §422.435(c) satisfies each of these criteria, the regulation under attack does not contravene the Trade Secrets Act, and the final section of this opinion shall be devoted to plaintiff's argument that the Secretary's disclosure regulation is "arbitrary, capricious, and an abuse of discretion."

I.

The Freedom of Information Act was enacted in 1966, and became effective one year later. It was the culmination of a continuing congressional effort to improve public access to information held by government agencies. The Freedom of Information Act amended the public information provisions of the Administrative Procedure Act by eliminating direct interest as a condition of obtaining information,[4] narrowing the standards for concealing information, and providing for judicial review of agency decisions to withhold information. *See Generally*, Note, The Freedom of Information Act: A Seven Year Assessment, 74 Colum. L.Rev. 895, 896-898 (1974).

[4]Compare 5 U.S.C. §552(a)(3) with Act of June 11, 1946, ch. 324 §3(c), 60 Stat. 238.

The Freedom of Information Act embodies a general philosophy of full agency disclosure. *See Department of Air Force v. Rose*, 425 U.S. 352, 360-361 (1976); *Environmental Protection Agency v. Mink*, 410 U.S. 73, 80 & n.6 (1973). Section 552(a) provides that each agency shall make its records available to the public, subject to the requirement that the parties seeking disclosure reasonably describe the information being sought and assume the cost of its reproduction. The Act also exempts nine categories of agency records from the rule of mandatory disclosure. 5 U.S.C. §552(b). Although several earlier opinions had concluded that these exemptions precluded agency release of exempted data, *see Continental Oil Co. v. Federal Power Commission*, 519 F.2d 31 (5th Cir. 1975); *Westinghouse Electric Corp. v. Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), it is now clear that these exemptions merely remove certain classes of information from the Act's otherwise mandatory disclosure requirements. *Chrysler Corporation v. Brown*, ____ U.S. ____, ____, 47 U.S.L.W. 4434, 4437-4438 (1979). An agency is therefore free to disclose exempted materials, subject to the usual limitations on agency action, *Pennzoil v. Federal Power Commission*, 534 F.2d 627 (5th Cir. 1976); *General Dynamics Corp. v. Marshall*, 572 F.2d 1211 (8th Cir. 1978); *Chrysler Corp. v. Schelsinger*, 565 F.2d 1172 (3d Cir. 1977); *Charles River Park "A", Inc. v. Dept. of Housing and Urban Development*, 171 U.S. App. D.C. 286, 519 F.2d 935 (1975); and the Freedom of Information Act would not bar disclosure of the Hospital's cost report even if it fell within the exemption for confidential commercial or financial information.[5]

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[5] 5 U.S.C. §552(b)(4) exempts the following records from the mandatory disclosure requirements:

(b) [FOIA] does not apply to matters that are –

• • •

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential . . . .

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II.

The Department of Health, Education and Welfare has specifically authorized disclosure of cost reports filed by hospitals participating in the Medicare program. 20 C.F.R. § 422.435 (c). The applicable provision states:

> The following shall be made available to the public under the conditions specified:
>
> • • •
>
> (c) Upon request in writing, cost reports submitted by providers of services pursuant to section 1815 of the Act to enable the Secretary to determine amounts due such providers.

Plaintiff, however, argues that the regulation is invalid because it contravenes the Trade Secrets Act, 18 U.S.C. §1905, which forbids government employees from disclosing:

> . . . to any extent not authorized by law any information coming to him in the course of his employment or official

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Charles River Park "A", Inc. v. Dept. of Housing and Urban Development, supra, sets forth the most widely accepted criteria for determining whether information falls within this exemption. There, the Court held that commercial or financial records would be regarded as confidential within the meaning of the trade secrets exemption if disclosure would have either of the following effects: (a) it would impair the government's ability to obtain necessary information in the future, or (b) it would cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 940.

The cost report at issue in this case clearly contains detailed commercial and financial information. While the Hospital's administrator avers that disclosure of this information will impair St. Joseph's competitive position, it has been repeatedly argued that such information is equally available from other sources. However, because the Freedom of Information Act would not preclude disclosure of the "cost report" even if it contained confidential commercial and financial information within the meaning of 5 U.S.C. §552(b)(4), the Court need not resolve this factual issue and shall assume that information contained in the Hospital's cost report would otherwise be exempt.

> duties . . . or [any] report or record made to or filed with, such department . . . which information concerns or relates to the trade secrets, . . . operations, . . . or . . . confidential statistical data, amount or source of any income, profits, losses, or expenditures of any . . . corporation . . .

As in past cases, the Secretary contends that H.E.W.'s regulation mandating disclosure is entitled to the force and effect of law thereby providing the authorization necessary to legalize release of hospital cost reports under the Trade Secrets Act.[6]

In precisely this context the United States Supreme Court has recently indicated that properly promulgated agency regulations

[6]Disclosure of medicare cost reports has been challenged in a number of reported cases antedating the Supreme Court's opinion in *Chrysler Corp. v. Brown, supra.* In three of these cases the provider's application for injunctive relief was denied. *Westchester General Hospital, Inc. v. Califano,* 464 F. Supp. 236 (M.D. Fla. 1979); *St. Mary's Hospital, Inc. v. Califano,* 462 F. Supp. 315 (S.D. Fla. 1978); *Doctor's Hospital of Sarasota, Inc. v. Califano,* 455 F. Supp. 376 (M.D. Fla. 1978). In three other reported cases, disclosure was enjoined. *Humana of Virginia, Inc. v. Blue Cross of Virginia,* 455 F. Supp. 1174 (E.D. Va. 1974); *Parkridge Hospital, Inc. v. Califano,* 430 F. Supp. 1093 (E.D. Tenn. 1977); *McCoy v. Weinberger,* 386 F. Supp. 504 (W.D. Ky. 1974). However, in light of the *Chrysler* opinion, the latter decisions can no longer be regarded as persuasive authority. For example, disclosure was enjoined in *McCoy v. Weinberger, supra,* because the Court found the cost reports exempt within the meaning of 5 U.S.C. §552(b)(4). In these circumstances, it held that disclosure would exceed the applicable regulations and contravene the Freedom of Information Act. Since it is now clear that the Freedom of Information Act does not preclude voluntary disclosure, and the disclosure at issue in that case antedated the regulations at issue here, this decision can offer very little guidance. Likewise, in *Humana of Virginia, Inc. v. Blue Cross of Virginia, supra,* the Court concluded that medicare provider cost reports fell within the (b)(4) exemption and, as a result, that disclosure was barred by 18 U.S.C. §1905. However, inasmuch as the Supreme Court has subsequently ruled that a valid substantive agency regulation may provide the "authorization" necessary to relax the prohibition of 18 U.S.C. §1905, the *Humana* opinion can no longer be regarded as dispositive. Finally, the persuasive value of the *Parkridge Hospital* opinion has been similarly diminished by the fact that the district court was understandably unable to anticipate the *Chrysler* ruling and failed to undertake its three-part analysis to determine whether 20 C.F.R. §422.435(c) was entitled to the "force and effect of law."

may provide the authorization necessary to exempt an otherwise illegal disclosure from the Trade Secrets Act. *Chrysler Corp. v. Brown,* ____ U.S. ____, 47 U.S.L.W. 4434 (1979). However, to enjoy the "force and effect of law," the Court has indicated that the regulation must be authorized by Congress, possess certain "substantive" characteristics, and be the product of certain procedural requisites. *Id.* at 4440. Thus, in determining whether the Trade Secrets Act precludes disclosure in this case, the Court must determine whether §422.435(c) satisfies each of these criteria.

A.

The Administrative Procedure Act does not define "substantive" agency rules. The Act does, however, distinguish them from "interpretive" rules, and further definition may be derived by negative inference.[7] In addition, the United States Supreme Court has described a substantive or "legislative-type" rule as one affecting individual rights and obligations. *Morton v. Ruiz,* 415 U.S. 199, 232 (1974). Because the regulation at issue here governs the public's right to know as well as the Hospital's "confidentiality rights," there can be little doubt that §422.435(c) constitutes a "substantive" regulation, at least insofar as that term has been judicially defined. *Chrysler Corp. v. Brown,* ____ U.S. ____, 47 U.S.L.W. at 4440.

Nevertheless, the fact that an agency regulation may be characterized as "substantive" does not alone entitle it to the "force and effect of law." Since the legislative power of the United States is vested in Congress, an agency's exercise of quasi-legislative authority must be congressionally authorized and executed in accordance with whatever limitations that branch of government has seen fit to impose. *Batterton v.*

[7]5 U.S.C. §553(b), also *Chrysler Corp. v. Brown,* ____ U.S. ____, 47 U.S.L.W. at 4440 n.31.

Francis, 432 U.S. 416, 425 n.9 (1977); *Morton v. Ruiz, supra* at 232; *National Labor Relations Board v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969). Accordingly, the Court must now consider whether §422.435(c) is the product of a congressional grant of legislative authority; and if so, whether the procedural requirements set forth in the Administrative Procedure Act have been complied with.

B.

In promulgating 20 C.F.R. §422.435(c), the Secretary relied upon the congressional authorization conferred by sections 405, 1302, and 1306 of Title 42. (40 F. Reg. 27649). Sections 405[8] and 1302[9] are, however, nothing more than "housekeeping" statutes which authorize the Secretary to promulgate what the Administrative Procedure Act terms "rules of agency practice or procedure" as opposed to "substantive" rules.[10] Furthermore, the

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[8]42 U.S.C. §405(a) provides:

> (a) The Secretary shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.

[9]42 U.S.C. §1302 provides:

> The Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health, Education and Welfare, respectively, shall make and publish such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration of the functions with which each is charged under this chapter.

[10]Compare 5 U.S.C. §301:

> The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records,

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Secretary cites nothing in the legislative history of these provisions which would indicate that they were intended to serve as a substantive grant of legislative power to promulgate rules authorizing the release of trade secrets or confidential business information. Consequently, neither Section 405 nor Section 1302 can be regarded as authorizing the Secretary to promulgate regulations limiting the scope of Section 1905. *Chrysler Corp. v. Brown*, ____ U.S. at ____, 47 U.S.L.W. at 4443; *Charles River Park "A", Inc. v. Dept. of Housing and Urban Development*, 519 F.2d 935, 942-943 (D.C. Cir. 1976).

Section 1106 of the Social Security Act, 42 U.S.C. §1306, does, however, provide such authorization. In pertinent part, it states:

> No disclosure . . . of any file, record, report or other paper, or any information, obtained at any time by the Secretary of Health, Education, and Welfare . . . in the course of discharging [his] . . . duties under this chapter . . . shall be made except as the Secretary of Health, Education, and Welfare . . . may by regulations prescribe.

The congressional intent behind this provision first became an issue in Freedom of Information Act cases when private parties sought to obtain medicare survey reports. The agency defended against such suits arguing that Section 1306 provided a specific statutory exemption from the Freedom of Information Act's mandatory disclosure requirements. The Third Circuit Court of Appeals rejected this argument, holding that Section 1306 was not within the scope of the third exemption because it neither identified the class of items that Congress considered ap-

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> papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

The Supreme Court has observed that the plain language of this provision merely grants an agency authority to regulate its own affairs. As a result, it could not serve as authority to limit the scope of Section 1905. *Chrysler Corp. v. Brown*, ____ U.S. ____, 47 U.S.L.W. at 4442.

propriate for exemption nor established guidelines which the Secretary was required to follow in determining what materials should be excluded from its terms. The Court also indicated that Section 1306 could not be regarded as specifically exempting survey reports, based upon the assumption that this provision was only intended to shield H.E.W. information concerning individuals. *Stretch v. Weinberger,* 495 F.2d 639 (3d Cir. 1974). Two other circuits cited this conclusion with approval before the issue became academic as a result of a 1976 amendment to the third exemption.[11] *Schecter v. Weinberger,* 506 F.2d 1275 (D.C. Cir. 1974); *Serchuck v. Weinberger,* 493 F.2d 663 (5th Cir. 1976). The Ninth Circuit did not, however, share this view, concluding as did Judge MacKinnon of the District of Columbia Circuit, that Section 1306 exempted information concerning both individuals and institutions. *People of the State of California v. Weinberger,* 505 F.2d 767 (9th Cir. 1974); *Schecter v. Weinberger,* 498 F.2d 1015 (D.C. Cir. 1974); and although the legislative history does not unequivocally declare the scope of

[11]In 1976 Congress amended 5 U.S.C. §553(b)(3) to narrow the scope of this exemption by excluding statutes which permitted wholly discretionary nondisclosure. The Conference Committee Report on the final version of the Exemption 3 amendments stated:

> The conferees intend this language to overrule the decision of the Supreme Court in *Administrator, FAA v. Robertson,* 422 U.S. 255 (1975), which dealt with section 1104 of the Federal Aviation Act of 1958 (49 U.S.C. 1504). Another example of a statute whose terms do not bring it within this exemption is section 1106 of the Social Security Act (42 U.S.C. 1306) [The statute involved in *Stretch v. Weinberger*].

H.R. Conf. Rep. No. 94-1441 *reprinted in* (1976) *U.S. Code Cong. & Admin. News,* 94th Cong., 2d Sess. 2244, 2261 (footnote omitted).

this provision,[12] contemporaneous enactments and subsequent interpretations by the agency charged with its administration both reveal that the narrower meaning ascribed by the Third Circuit was probably not intended.

42 U.S.C. §1306 first appeared as an amendment to the 1935 Social Security Act. Act. of August 10, 1939, Pub. L. No. 76-379, 53 Stat. 1398, 76th Cong., 1st Sess. As in any case involving issues of legislative intent, the starting point must be the language of the provision itself. *International Brotherhood of Teamsters v. Daniel,* ____ U.S. ____, ____, 99 S.Ct. 790, 795 (1979). To this extent, the phraseology of Section 1306 emphatically states that the prohibition against H.E.W. disclosure applies to "*any* file, record, report or other paper, or *any* in-

[12]Section 1106 was introduced in the following manner:

> Two amendments of general character are contained in this bill. They are:
>
> 1. An amendment to prohibit the disclosure of information obtained by the Board or its employees except under certain restricted conditions related to proper administration.

House Report No. 728, 76th Cong., 1st Sess., at 32; Senate Report No. 734, 76th Cong., 1st Sess., at 39. The reports contained the following description:

> Section 1106: This section prohibits the disclosure, except pursuant to Board regulations, of any returns or statements filed with the Commissioner of Internal Revenue under title VIII of the Social Security Act or the Federal Insurance Contributions Act, or regulations thereunder, which have been transmitted by the Commissioner to the Board. The prohibition against disclosure, except pursuant to Board regulations, also extends to any file, record, report, paper, or information obtained by the Board or any of its officers or employees in the course of official duties, and any such material obtained by any person from the Board or any ot [sic] its officers or employees. Violation of the prohibition is punishable as a misdemeanor.

House Report at 77, Senate Report at 88-89.

formation obtained at *any* time by the Secretary." It would be difficult to imagine a more comprehensive provision; and ironically, it was the very breadth of this language upon which the Secretary relied in refusing to reveal institutional records. As a result, in 1972 Congress found it necessary to amend Section 1306, thereby relaxing its general prohibition to permit prospective disclosure of certain institutional records. 86 Stat. 1329, 1428, 1461-1462. These amendments would not, of course, have been necessary if Section 1306 had not originally been intended to prohibit disclosure of "any" information submitted to the Secretary, including information concerning institutional participants in the medicare and medicaid programs. Furthermore, as noted by Judge MacKinnon and the Ninth Circuit, it is plainly incorrect to assume that Congress originally intended Section 1306 to apply only to information concerning individual recipients because the 1939 amendments specifically required each state to guarantee individual privacy in the programs which it administered, while generally prohibiting any and all disclosure by federal administrators. The fact that Congress treated these situations differently and employed unique terms in drafting each of the applicable provisions[13] can only underscore the fact that Section 1106 of the Social Security Act, 42 U.S.C. §1306, was intended as a general prohibition of disclosure, regardless of the information's source.

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[13]Compare 53 Stat. 1361, 1380, 1397. The House and Senate Reports explained these provisions as follows:

> The only other important amendment affecting the public assistance titles is one which requires the states, in order to receive federal grants, to provide safeguards to restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with the administration of the plan. All three assistance titles would be thus amended, the obvious purpose being to insure efficient administration and protect recipients from humiliation and exploitation.

House Report at 29, Senate Report at 31. These statements should also be compared with the House and Senate comments quoted at note 10 *supra*.

Despite their disagreement concerning the breadth of the original section 1306 prohibition, the Courts have generally recognized the Secretary's broad authority to relax this absolute prohibition as the public interest may require. *People of the State of California v. Weinberger*, 505 F.2d at 768; *Schecter v. Weinberger*, 506 F.2d at 1277. Moreover, in view of the fact that this legislative provision has always been applied to agency records concerning institutional performance, there can be little doubt that the disclosure mandated by 20 C.F.R. §422.435(c) is reasonably within the broad delegation of congressional authority conferred by Section 1306. In fact, if the Senate Committee report concerning the 1972 amendments were to offer any guidance, it would surely commend the administrative regulation now under attack.[14] Consequently, there can be little

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[14]S.Rep. No. 92-1230, 92nd Cong., 2nd Sess., 1972 reveals recent Congressional judgments concerning H.E.W. disclosure:

> Disclosure of Information Concerning the Performance of Carriers, Intermediaries, State Agencies, and Providers Under Medicare and Medicaid
>
> (Sec. 249C of the bill)
>
> As part of his responsibility for administration of the medicare program, the Secretary, through the Social Security Administration regularly prepares formal evaluations of the performance of contractors — carriers, intermediaries and State agencies — which assist in program administration. In addition the Social Security Administration prepares program validation review reports, which are used as management and audit devices for informing intermediaries of findings and recommendations concerning selected providers of services and some of the aspects of their own medicare operations and of indicating necessary corrective follow-up action with respect to both the provider as well as the intermediary.
>
> These evaluations and reports are of significant help in reviewing either the overall administrative performance of an individual contractor or a particular aspect of its operation. Additionally, the summary evaluations comparing the performance of one contractor with that of another are very useful. However, these evaluations and reports are not available to the public in general.
>
> The committee recognizes the dilemma which exists in this situation. On the one hand is the need for public awareness of the deficiencies of contractors and provider performance with the accompanying pressures for improvement in administration that only

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doubt that the grant of authority set forth in Section 1306 contemplates the regulation at issue here. *See also, Cedars Nursing & Convalescent Center, Inc. v. Aetna Life and Casualty*

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> such awareness can bring as well as the desire to conform with the overall intent of the Freedom of Information Act. On the other hand, these evaluations and reports require review of details some of which do not provide a basis for conclusion as to overall performance and the initial evaluation may not always be based on all the pertinent facts. The possible release of portions of a report which may include unqualified or incomplete information may be unfair to the contractors or providers. The committee recognizes that when there is public disclosure of this type of information on contractor performance there is a need to provide contractors with sufficient opportunity to respond to the information in the reports before their publication so as to avoid release of possibly erroneous findings, without rebuttal, which might prove damaging to their reputation.
>
> The committee bill would require that the Secretary make public the following types of evaluations and reports dealing with the operation of the medicare and medicaid programs: (1) individual contractor performance reviews and other formal evaluations of the performance of carriers, intermediaries, and State agencies, including the reports of followup reviews; (2) comparative evaluations of the performance of contractors — including comparisons of either overall performance or of any particular contractor operation; (3) program validation survey reports — with the names of individuals deleted.
>
> The bill would require prompt and timely public disclosure of reports prepared by the Secretary and submitted to any contractor or provider of services for review and comment after the third month following enactment. Such reports would include only those which are official in nature and would not include internal working documents such as informal memoranda. Under the bill, public disclosure of evaluations and reports would not be required to be made until the contractor, State agency, or facility was given suitable opportunity — not to exceed 60 days — for comments as to the accuracy of the findings and conclusions of the evaluation or report with such comments being made part of the report where the portions originally objected to have not been modified in line with the comment. The reports would not be required to contain information concerning those deficiencies which are known by the Secretary to have been fully corrected within 60 days of the date they were initially brought to the attention of the contractor or provider of services.

Footnote continued on next page—

Insurance Co., No. 79-1416 (E.D. Pa. May 7, 1979); *Brookwood Medical Center, Inc. v. Califano*, No. C78-2148A (N.D. Ga. May 24, 1979).

C.

Having determined that 20 C.F.R. §422.435(c) constitutes a "substantive" regulation contemplated by an express congressional grant of quasi-legislative authority, it remains to be determined whether the Secretary promulgated this regulation in accordance with the procedural requirements imposed by Section 4 of the Administrative Procedure Act, 5 U.S.C. §553. This provision requires an agency to afford interested persons general notice of the proposed rulemaking and an opportunity to comment before a substantive rule is promulgated.[15] The notice of proposed rulemaking published by the Secretary (40 F.Reg. 17849) and the promulgation statement (40 F.Reg. 27648) reveal that these procedural requirements were met. Plaintiff nonetheless urges this Court to impose

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—Footnote continued from preceding page

> It is the committee's intent that the requirement of disclosure of such evaluations and reports not lessen the effort of the Secretary in his present information-gathering activities nor is the provision in any way to be interpreted as otherwise limiting any disclosure of information otherwise required under the Freedom of Information Act.

p. 305-306. Moreover, the fact that the Finance Committee did not adopt Senator Ribicoff's proposal to limit Section 1106 to individual records constitutes a Congressional reaffirmation that this section applied to institutional records, and that waiver of its terms, should, for the most part, continue to rest in the Secretary's discretion.

[15]Informal rulemaking need not be based solely on the transcript of a hearing held before an agency. Indeed, the agency need not even hold a formal hearing. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 547 (1978).

additional procedural requirements after the fact because the minimum requirements fixed by Congress did not ensure mature consideration of the interests at stake. The United States Supreme Court has, however, repeatedly observed that Congress intentionally adopted minimal procedural requirements for public rulemaking.[16] While the agency is free to employ a more comprehensive formula, the Courts may not impose additional requirements absent "extraordinary" or "extremely compelling" circumstances. *Chrysler Corp. v. Brown*, ____ U.S. ____, ____, 47 U.S.L.W. at 4443 (1979); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. at 543; *Federal*

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[16]The Senate Report explains Section 553 as follows:

> This subsection states . . . the minimum requirements of public rule making procedure short of statutory hearing. Under it, agencies might in addition confer with industry advisory committees, consult organizations, hold informal "hearings," and the like. Considerations of practicality, necessity, and public interest . . . will naturally govern the agency's determination of the extent to which public proceedings should go. Matters of great import, or those where the public submission of facts will be either useful to the agency or a protection to the public, should naturally be accorded more elaborate public procedures.

S.Rep. No. 752, 79th Cong., 1st Sess., 14-15 (1945). The House Report is in complete accord:

> Uniformity has been found possible and desirable for all classes of both equity and law actions in the courts. . . . It would seem to require no argument to demonstrate that the administrative agencies, exercising but a fraction of the judicial power may likewise operate under uniform rules of practice and procedure and that they may be required to remain within the terms of the law as to the exercise of both quasi-legislative and quasi-judicial power. . . .
>
> The bill is an outline of minimum essential rights and procedures. . . . It affords private parties a means of knowing what their rights are and how they may protect them. . . .
>
> . . . [The bill contains] the essentials of the several forms of administrative proceedings. . . .

H.R.Rep. No. 1980, 79th Cong., 2d Sess. 9, 16-17 (1946).

Power Commission v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326, 333 (1976); *Federal Communications Commission v. Schreiber*, 381 U.S. 279, 290 (1965); *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

Plaintiff argues that this case presents such circumstances because the notice of proposed rulemaking was misleading, issues of far reaching importance were to be considered, and because the Secretary ultimately failed to give these issues the type of "mature consideration" which they warranted. These general objections will not, however, justify departure from the "very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. at 544.

To begin with, the Secretary's notice of proposed rulemaking could not have been misleading to individuals who were familiar with the regulations and statutes under consideration. Since the institutions which are subject to such regulations are presumably familiar with their import, it can hardly be concluded that those affected did not receive adequate notice of the proposed rulemaking. With respect to plaintiff's argument that the importance of the issues warranted additional safeguards, reference need only be made to the United States Supreme Court's repeated warning that the complexity or importance of the issues under consideration will not alone justify ex post facto judicial interference with agency rulemaking procedures. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. at 545. Finally, as the next section of this opinion will reveal, the Court does not find the Secretary's action "arbitrary, capricious, or an abuse of discretion" and cannot therefore conclude that he failed to give these issues the type of mature consideration warranted by the interests at stake.

D.

In *Chrysler Corp. v. Brown*, ____ U.S. ____ (1979), the Supreme Court stated that any regulation mandating disclosure in violation of 18 U.S.C. §1905 would be invalid because it was "not in accordance with law." *Id.* at 4444. However, the Court also indicated that regulations which enjoyed the "force and effect of law" would operate to provide the "authoriz[ation]" which is necessary to invoke the internal exception to the general prohibition of the Trade Secrets Act. As noted earlier, a regulation can attain this status if (a) it is a "substantive" rule, (b) the reviewing court can reasonably conclude that the regulation was contemplated by a congressional grant of rulemaking authority, and (c) the applicable procedural requirements were satisfied during its promulgation. Inasmuch as 20 C.F.R. §422.435(c) satisfies each of these criteria, it is entitled to the "force and effect of law." The authorization which it confers removes disclosure of medicare cost reports from the prohibition of 18 U.S.C. §1905. The regulation is therefore "in accordance with law" and the Court must now consider whether the Secretary's action satisfies the remaining criteria of 5 U.S.C. §706(2)(A).

III.

Since the challenged regulation was adopted pursuant to Section 1106 of the Social Security Act, 42 U.S.C. §1306, and this provision does not require an evidentiary hearing, H.E.W. was authorized to employ the "notice and comment" rulemaking procedure established by §4 of the Administrative Procedure Act. 5 U.S.C. §553. This Section of the APA contemplates a three-step rulemaking process which begins with the formulation and publication of an initial agency proposal. This proposal identifies the agency's tentative empirical findings and sets forth the conclusions of expert consultants upon which it may rely. The proposal may also contain a description of any empirical or

methodological techniques which the agency has utilized in reaching its conclusions. The second step of the process is a solicitation period during which written or oral responses to the proposal may be submitted by interested parties.[17] The solicitation period is then followed by renewed agency deliberation, culminating in a statement announcing the rule and justifying or explaining its normative or empirical predicates through reference to the record which was developed in the first two steps. Wright, The Court and the Rulemaking Process: The Limits of Judicial Review, 59 Cornell L. Rev. 375, 395.

When Congressional rulemaking authority contemplates the notice and comment rulemaking procedure of §553 without requiring a quasi-judicial hearing, reviewing courts need only determine whether the agency action, findings, and conclusions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A). In applying this standard, the focal point will ordinarily be the administrative record already in existence, not some new record which is made initially by the reviewing court.[18] If the decision of the agency is not sustainable on the administrative record which had been made, the rule must be vacated or the matter remanded for further consideration. *National Nutritional Foods Association v. Matthews*, 557 F.2d 325 (2d Cir. 1977); *Federal Power Commission v. Transcontinental Gas Pipeline Corp.*, 423 U.S. 326, 331 (1976). De novo review is appropriate only where inadequate fact-finding procedures are employed in an adjudicatory

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[17] 5 U.S.C. §553.

[18] The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based. *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943). The Court cannot supply an alternative, unstated ground to support an agency's decision if that ground is one that the agency alone is authorized to make. *Gulf States Utilities Co., v. FPC*, 411 U.S. 747, 764 (1973).

proceeding, or where judicial proceedings are brought to enforce certain administrative actions. *Camp v. Pitts*, 411 U.S. 138, 141 (1973); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971).[19]

Inasmuch as the agency record is the focal point of notice and comment rulemaking review, and since a trial record is not ordinarily prepared, Section 533(c) requires the proponent to "incorporate in the rules a concise and general statement of their basis and purpose." While this provision does not require the agency to supply the type of specific and detailed findings and conclusions which are customarily associated with quasi-judicial proceedings, *Consumer Union of the United States, Inc. v. Consumer Product Safety Commission*, 491 F.2d 810, 812 (2d Cir. 1974), the language of Section 553 still mandates publication of a sufficiently detailed statement of the agency's rationale to permit meaningful judicial review. *National Nutritional Foods Association v. Weinberger*, 512 F.2d 688, 701 (2d Cir. 1975).

There are as yet few specific rules defining the "adequacy" of an informal rulemaking record.[20] This is probably due to the fact that the requisites of meaningful review may vary depending upon the nature of the administrative action under consideration. Friendly, "Some Kind of Hearing," 123 U. Pa. L.Rev. 1267, 1291-1292 (1975). That is, pure policy determinations inherently defy articulation with any degree of mathematical

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[19]Neither situation is presented here. The only deficiency suggested during oral argument is that the Secretary inadequately explained his decision. As *Citizens To Preserve Overton Park v. Volpe, supra* demonstrates, this failure, even if it had occurred here, would not warrant de novo review. *See also Camp v. Pitts, supra.*

[20]See, e.g. Hamilton, Procedures for the Adoption of Rules of General Applicability, 60 Cal. L.Rev. 1276, 1333-1336 (1972); Pedersen, Formal Records and Informal Rulemaking, 85 Yale L.J. 38, 45-51 (1975); Verkuil, Judicial Review of Informal Rulemaking, 60 Va. L.Rev. 185 (1974), but see 42 U.S.C. §7607(d).

precision, while technical judgments can generally be supported by concrete empirical findings and data. Nevertheless, even when an agency's judgment is one of policy, review must be based upon "the whole record or those parts of it cited by a party," 5 U.S.C. §706(2), and the agency must articulate the basis for its policy choice with sufficient clarity to permit judicial review. *Citizens To Preserve Overton Park v. Volpe*, 401 U.S. at 416-418. As Judge Gurfein emphasized in *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 252 (2d Cir. 1977):

> It is not in keeping with the rational process to leave vital questions, raised by comments which are of cogent materiality, completely unanswered. The agencies certainly have a good deal of discretion in expressing the basis of a rule, but the agencies do not have quite the prerogative of obscurantism reserved to legislatures. "Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body." *F.C.C. v. RCA Communications, Inc.*, 346 U.S. 86, 90, 73 S.Ct. 998, 1002, 97 L.Ed. 1470 (1953) (Frankfurter, J).

To the extent that each agency bears the burden of offering some reasoned explanation for its notice and comment rulemaking, *United States v. Nova Scotia Food Products Corp.*, 568 F.2d at 251, 253; *Associated Industries of New York State, Inc. v. U.S. Department of Labor*, 487 F.2d 342, 352 (2d Cir. 1973), the Administrative Procedure Act requires that all new rules be accompanied by a "concise and general" statement of the findings and rationale which underlie them. Second Circuit caselaw indicates that the adequacy of such statements should be assessed in light of the following general principles:

> What we are entitled to at all events is a careful identification by the Secretary, when his proposed standards are challenged, of the reasons why he chooses to follow one course rather than another. Whether that choice purports to be based on the existence of certain

> determinable facts, the Secretary must, in form as well as in substance, find those facts from evidence in the record. By the same token, when the Secretary is obliged to make policy judgments where no factual certainties exist or where facts alone do not provide the answer, he should so state and go on to identify the considerations he found to be persuasive.

United States v. Nova Scotia Food Products, Inc., 568 F.2d at 253. Then, if the reviewing court determines that an administrative agency's stated justification for its informal rulemaking does not provide an adequate basis for judicial review, it must conduct an *Overton* hearing to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary.[21]

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[21] In *Citizens To Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), the Secretary of Transportation rendered a decision following a statutorily required public hearing designed to afford community input concerning the use of park land in highway construction. The hearing was nonevidentiary and quasi-legislative in nature. It required no formal findings of fact.

On review in the district court, the parties introduced opposing affidavits addressing the validity of the decision. On appellate review, the Supreme Court held that de novo consideration was unauthorized and that the affidavits were merely "post hoc rationalizations" which had traditionally been regarded as an adequate basis for review. Review, said the Court, is to be based "on the full administrative record that was before the Secretary at the time that he made his decision. *Id.* at 420.

Two years later, the Court reinforced the doctrine that judicial review of informal agency adjudication is to be conducted solely upon the administrative record. In *Camp v. Pitts*, 411 U.S. 138 (1973), the Comptroller of Currency, proceeding under a statute which did not require a formal hearing, refused to issue a certificate authorizing the organization of a new bank. That refusal came under attack in a district court which, on examination of the record which was before the Commissioner, held that de novo review was unwarranted; and, viewing only the administrative record, sustained the Comptroller's ruling. Although the Circuit Court would have remanded the case for a trial de novo, the Supreme Court agreed that the appropriate standard of review was whether the Comptroller's adjudication was arbitrary, capricious, or an abuse of discretion, and that in applying this standard the focal point for review should be the existing administrative record, not a new record made initially by the reviewing court. *Id.* at 142.

The application of these principles is well illustrated by the National Nutritional Foods litigation. *National Nutritional Foods Association v. Weinberger*, 376 F. Supp. 142, *remanded* 512 F.2d 688 (2d Cir.) *cert. denied sub nom., National Nutritional Foods Association v. Matthews*, 423 U.S. 827 (1975); *National Nutritional Foods Association v. Matthews*, 418 F. Supp. 394, *rev'd* 557 F.2d 325 (2d Cir. 1977). There, producers and vendors of vitamin preparations challenged an FDA "notice and comment" rule which classified vitamins A and D as "drugs" when dispensed in excess of certain designated dosages, thereby restricting such dosages to prescription sales. On a motion for summary judgment, the district court upheld the regulations and dismissed the complaint, finding that 21 C.F.R. §3.94-5 satisfied the arbitrary and capricious standard of review. *National Nutritional Association of Weinberger*, 376 F. Supp. 142 (S.D.N.Y. 1974). The Court of Appeals did not, however, agree. It noted that these regulations had been adopted to interpret the definition of "drugs" provided by Congress in 21 U.S.C. §321(g)(1). This statute requires a finding of therapeutic purpose and intent before a product may be classified as a "drug". *National Nutritional Foods Association v. Food & Drug Administration*, 504 F.2d 761, 789 (2d Cir.) *cert. denied*, 420 U.S. 946 (1975). The Commissioner made no such finding. Moreover, in an intervening proceeding, the Court had invalidated another FDA regulation which would have classified as "drugs" certain preparations in excess of the U.S. Recommended Daily Allowance 21 C.F.R. §80.1(f)(1). The invalidation of 21 C.F.R. §125.1(h) did not, however, automatically result in repudiation of the regulations under review because the Court noted that, while not apparent from his promulgation statement, the Commissioner may have engaged in a more detailed analysis of vitamins A and D than he did with the generic rule which was overturned in *National Nutritional Foods Association v. FDA, supra.* Accordingly, the matter was remanded to the district court for

an "Overton-type" hearing where Judge Frankel was directed to give the Commissioner an opportunity to present his complete reasoning with respect to the vitamin A and D drug classifications, either through affidavits or testimony.

In light of this precedent, the following analysis suggests itself. First, the applicable standard for review must be particularized. Second, the Court must determine whether the agency record presented thus far is adequate to permit meaningful judicial review. If it is not, the Court must conduct an "Overton-type" hearing to permit the Secretary to present his complete reasoning. On the other hand, if the administrative record is adequate to permit meaningful judicial review, the Court may immediately proceed to consider whether the Secretary's action was "arbitrary, capricious, or an abuse of discretion."

In determining whether an agency's action has been arbitrary, capricious, or an abuse of discretion, the Court must ascertain whether the decision was based upon the consideration of relevant factors. *See Citizens To Preserve Overton Park v. Volpe, supra; Sabin v. Butz,* 515 F.2d 1061, 1067 (10th Cir. 1975); *AFSCME v. City of Cleveland,* 484 F.2d 339, 346 (6th Cir. 1973). Applied to regulations mandating agency disclosure, this general principle has been refined to require agency consideration of:

(1) whether disclosure of the particular information will aid the agency in fulfilling its functions,

(2) the harm, if any, to providers and the public if the information is disclosed

(3) alternatives to full disclosure which will provide consumers with adequate knowledge to make informed choices and participate in the regulatory process.

Pennzoil v. Federal Power Commission, 534 F.2d 627, 632 (5th Cir. 1976); *Superior Oil Co. v. Federal Energy Regulatory Commission,* 563 F.2d 191, 203 (5th Cir. 1977); and, in the final

analysis, the agency must, of course, determine whether the public interest in disclosure outweighs the potential harm to the provider. *Pennzoil v. Federal Power Commission,* 534 F.2d 631-632.[22]

The Secretary and the Department of Health, Education and Welfare are charged with administering numerous social welfare programs and assuring the proper expenditure of public funds. The statements in both the Memorandum of Record and the promulgation statement reveal the Secretary's determination that disclosure of hospital cost reports would aid the department in meeting its obligations to the nation by exposing direct evidence of medicare abuse to public scrutiny.[23] Furthermore the Secretary's Memorandum of Record and promulgation statement reveal that this conclusion was not drawn until the competive need for privacy, the existence of confidentiality, and the harm which might result from routine disclosure of cost reports had all been considered. In particular, the Secretary found that competition among providers is not even remotely as intense as competition between sellers in other areas of the economy. The, responding to comments suggesting that disclosure of cost reprts would lead to confusion and encourage abuse by labor organizations, the Commissioner stated:

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[22]The *Pennzoil* case is, however, distinguishable in one important respect — the agency had merely indicated that disclosure might cause harm and summarily concluded that the public interest outweighed this danger. The Circuit Court held that this brief statement was inadequate to justify such a conclusion. Here, by contrast, the agency prepared a four page "Memorandum of Record" and published a two page explanation of its action in the Federal Register.

[23]In addition, the disclosure of cost reports will provide the public with the information which is necessary to determine a hospital's financial stability as well as its commitment to providing quality services in a particular treatment area. It will therefore facilitate informed decision making in the selection of hospitals and nursing homes. *St. Mary's Hospital, Inc. v. Califano,* 462 F. Supp. 315, 319 (S.D. Fla. 1978).

> The Social Security Administration knows of no evidence and does not accept the assertion that labor unions and consumer groups are seeking to destroy the hospitals of the United States.

40 F.Reg. 27649.

Turniing to the third criterion there can be little doubt that the Commissioner carefully reviewed various alternatives to full disclosure prior to adopting §422.435(c). Indeed, the memorandum of record reveals that prior to 1970, cost reports information had been kept confidential by the Secretary and his fiscal intermediaries. In 1970, cost report information was opened to public scrutiny, but only to the extent of revealing information "relating to payments to, and utilization data concerning, providers and other organizations and facilities furnishing services under Title XVIII of the Act." The Commissioner determined that although this limited amount of disclosure was useful, it was not sufficient.

As might be anticipated, the commentators did not wholeheartedly agree with the Commissioner's recommendation, and at least one of them suggested an alternative — allowing providers to prepare a cost report abstract for public disclosure. This proposal was, however, rejected because it would enable a provider to conceal whatever information it chose. The Commissioner also found this proposal "contradictory to the basic purpose underlying the provision." 40 F.Reg. 27649.

The preceding analysis reveals that the agency's rationale in adopting 20 C.F.R. §422.435 has been stated with sufficient clarity to permit meaningful judicial review. An "Overton-type" hearing is therefore unnecessary, and no triable issues of fact have been presented with respect to the APA claim. It is also clear that §422.435 was promulgated only after the Commissioner had determined that full disclosure would assist the

agency and advance the public interest without imposing significant commercial hardships upon providers. Furthermore, there can be little doubt that the Commissioner did not opt for full disclosure until more restrictive alternatives which had been tested or proposed were found inadequate to the task. Accordingly, the Court cannot conclude that the promulgation of this provision was either arbitrary, capricious, or an abuse of discretion. Nor is the regulation not "otherwise in accordance with law."

The Government's motion shall therefore be granted, plaintiff's application for preliminary injunctive relief is hereby denied, and the Clerk is hereby directed to enter a judgment dismissing the plaintiff's complaint.

/s/ HOWARD G. MUNSON
Howard G. Munson
U.S. District Judge

Dated: July 11, 1979
Syracuse, New York.

ADMINISTRATIVE DECISION, dated June 19, 1979

Medicare Program

Blue Cross of Central New York, Inc.
344 S. Warren St., P.O. Box 4809,
Syracuse, New York 13221

Herbert C. Radeker
Director of
Provider Reimbursement
(315) 424-3807

Andris Ozols
Provider
Reimbursement Manager
(315) 424-3808

June 19, 1979

Mr. James H. Abbott
Administrator
St. Joseph's Hospital
301 Prospect Avenue
Syracuse, NY 13203

Dear Mr. Abbott:

This is to acknowledge receipt of your letter dated June 14, 1979 and your disagreement at our releasing copies of your hospital's 1978 original submitted Uniform Financial Report and schedules of SSA-2552 submitted with it, to the Service Employees International Union.

We have been in contact with Mr. Steve Shaw of the Health Care Financing Agency who has stated the material requested must be released on or after June 21, 1979, depending upon receipt of payment.

Section 5.3 of the Health, Education, and Welfare Public Information Regulation dated August 1974, and issued under the

authority of 5 U.S.C. 552 (Freedom of Information Act), states in part that Medicare Intermediaries and Carriers are considered Operating Agencies of HEW for purposes of the Freedom of Information Act. Also, 42 CFR 422.435(c) specifically provides for the release of provider cost reports when the request is submitted in writing. It was also indicated by Mr. Shaw that public interest outweighs the preclusion of exempting these cost reports from disclosure.

Based on the above, we presently have no other alternative than to release the information as indicated in my letter of June 8, 1979 to Ms. Farr.

If you have any questions, please do not hesitate to call.

Sincerely,

/s/ HERBERT C. RADEKER
Herbert C. Radeker
Director of Provider Reimbursement

CC: Mr. Steve Shaw
Mr. Preston Lowen

HCR: amh

Statute

Ch. 93 PUBLIC OFFICERS EMPLOYEES 18 § 1905

§1905. Disclosure of confidential information generally

Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

June 25, 1948, c. 645, 62 Stat. 791.

Statute

42 § 1306 PUBLIC HEALTH AND WELFARE Ch. 7

§ 1306. Disclosure of information in possession of Department of Health, Education, and Welfare or Department of Labor; compliance with requests for information and services.

(a) No disclosure of any return or portion of a return (including information returns and other written statements) filed with the Commissioner of Internal Revenue under Title VIII of the Social Security Act or under subchapter E of chapter 1 or subchapter A of chapter 9 of Title 26, or under regulations made under authority thereof, which have been transmitted to the Secretary of Health, Education, and Welfare or to the Secretary of Labor,

as the case may be, by the Commissioner of Internal Revenue, or of any file, record, report or other paper, or any information, obtained at any time by the Secretary of Health, Education, and Welfare, or the Secretary of Labor, or by any officer or employee of the Department of Health, Education, and Welfare or the Department of Labor in the course of discharging their respective duties under this chapter, and no disclosure of any such file, record, report, or other paper, or information, obtained at any time by any person from the Secretary of Health, Education, and Welfare or the Secretary of Labor, as the case may be, or from any officer or employee of the Department of Health, Education, and Welfare or the Department of Labor shall be made except as the Secretary of Health, Education, and Welfare or the Secretary of Labor, as the case may be, may by regulations prescribe. Any person who shall violate any provision of this section shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not exceeding $1,000, or by imprisonment not exceeding one year, or both.

20 CFR §422.435

FEDERAL REGULATIONS

§422.435 Release of title XVIII information to the public.

The following shall be made available to the public under the conditions specified:

(a) Information as to amounts paid to providers and other organizations and facilities for services to beneficiaries under title XVIII of the Act: *Provided,* that no information identifying any particular beneficiaries shall be disclosed under this paragraph.

(b) The name of any provider of services or other person furnishing services to beneficiaries under title XVIII of the Act who—

(1) Has been found by a Federal court to have been guilty of submitting false claims in connection with title XVIII; or

(2) Has been found by a carrier or intermediary, after consultation with a professional medical association functioning external to program administration or, if appropriate, the State medical authority, to have been engaged in a pattern of furnishing services to such beneficiaries which are substantially in excess of their medical needs; except that the name of any provider or other person shall not be disclosed pursuant to a finding under this subparagraph (2), unless such provider or other person has first been afforded a reasonable opportunity to offer evidence on his behalf.

(c) Upon request in writing, cost reports submitted by providers of services pursuant to section 1815 of the Act to enable the Secretary to determine amounts due such providers.

[FR Doc. 75-16866 Filed 6-30-75; 8:45 a.m.]

10 NYCRR §§ 400.7 and 405.22.

400.7 Facility participation in title XVIII program. Every facility that provides a service which is reimbursable under the provisions of title XVIII of the Social Security Act shall make application to be an approved provider of such services pursuant to such title. If approved, the facility shall participate in such program and make appropriate claims for payment in any instance in which a patient is eligible for benefits under such program.

405.22 Admission and discharge. (a) The governing authority shall establish and provide the admitting office with written admission and discharge policies and shall not permit the function of admission and discharge of the admitting office to be assigned or delegated to an abortion or other referral agency, nor permit the splitting or sharing of fees between the referring

agency and the hospital. Such specific policies shall encompass the following: types of clinical conditions of patients to be admitted together with limitations imposed by law, licensure, physical limitations, staffing limitations, rules governing emergency admissions, policies concerning advance deposits, insurance agreements and other financial considerations, discharge of patients, medical information service and other relevant functions. No person shall be denied admission to the hospital because of race, creed, color, national origin, sex, blindness, or source of payment, except for fiscal capability thereof. . . .

NEW YORK PUBLIC HEALTH LAW §§ 2805-b

§ 2805-b. Admission of patients and emergency treatment of nonadmitted patients.

1. Every general hospital shall admit any person who is in need of immediate hospitalization with all convenient speed and shall not before admission question the patient or any member of his or her family concerning insurance, credit or payment of charges, provided, however, that the patient or a member of his or her family shall agree to supply such information promptly after the patient's admission. Every general hospital which maintains facilities for providing out-patient emergency medical care must provide such care to any person who, in the opinion of a physician, requires such care. . . .

UNREPORTED DECISIONS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON HOSPITAL CENTER,

Plaintiff,

v.

MUTUAL OF OMAHA,

Defendant;

JOSEPH A. CALIFANO, JR.,

Intervening Defendant.

NATIONAL HEALTH LAWYERS ASSN.
522 – 21st Street, N.W. Suite 708
Washington, D.C. 20006

Civil Action No. 78-2485

ORDER

Upon consideration of defendant Califano's motion for reconsideration, plaintiff's opposition thereto, and the entire record herein; said motion is denied, it appearing to the Court that:

(1) 42 U.S.C. § 1306(a) does not provide the requisite statutory authorization for the release by HEW – pursuant to 20 C.F.R. § 422.435(c) – of material which would otherwise be protected by 18 U.S.C. § 1905, because (a) the legislative history of 42 U.S.C. § 1306(a) indicates no congressional intent to limit the normal applicability of 18 U.S.C. § 1905, and (b) Congress in 1972 only added subsections (d) and (e) to 42 U.S.C. § 1306 and refused to adopt Sen. Ribicoff's proposed amendment which, it appears, would have clearly authorized the release of plaintiff's cost provider reports, *see* S. Rep. No. 1230, 92d Cong., 2d Sess. 305-06

(1972); *id.* at 1274-75 (additional views of Sen. Ribicoff); 118 Cong. Rec. 1027 (1972) (statement of Sen. Ribicoff); and

(2) 42 U.S.C. § 1306 and 18 U.S.C. § 1905 harmonize in that the former provision permits HEW to authorize – by properly promulgated regulations – solely the disclosure of all such information as does not fall within the scope of 18 U.S.C. § 1905.

A regulation sufficiently authorizes the disclosure of information which would otherwise be protected by 18 U.S.C. § 1905 only if such regulation has been promulgated pursuant to "a congressional grant of legislative authority," *Chrysler Corp.* v. *Brown*, 47 U.S.L.W. 4434, 4440 (U.S. April 18, 1979), and the test of whether a regulation has been so promulgated is, not whether the regulation is "in excess of statutory jurisdiction, authority, or limitation" for purposes of 5 U.S.C. § 706(2)(C), *see* 47 U.S.L.W. at 4442 n.40, but rather is whether, in enacting the pertinent statutory authorization, Congress was "concerned with public disclosure of trade secrets or confidential business information," *see id.* at 4441, *i.e.*, meant thereby "to provide authority for limiting the scope of § 1905," *see id.* at 4442.

It further appearing that the Government has requested that, in the event that defendant's motion for reconsideration is denied, the Court remand this case to the agency to determine whether the cost reports at issue are exempt from disclosure by reason of 18 U.S.C. § 1905, and it appearing that such a remand would be a wise exercise of this Court's discretion in that it would permit the agency with the relevant expertise and familiarity with the hospital industry to address the questions posed by this case, it is hereby

ORDERED that defendant's motion for reconsideration be and is denied; it is further

ORDERED that this case is referred to the Department of Health, Education and Welfare to determine whether or not the

cost reports at issue are exempt from disclosure by reason of 18 U.S.C. § 1905; and it is further

ORDERED that plaintiff's complaint be and is dismissed without prejudice.

/s/ GABRIEL A. GESELL
Gabriel A. Gesell
United States District Judge

June 25, 1979.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON HOSPITAL CENTER,

Plaintiff,

v.

MUTUAL OF OMAHA,

Defendant;

JOSEPH A. CALIFANO, JR.,

Intervening Defendant.

Civil Action No. 78-2485

ORDER

Upon consideration of defendants' motions to dismiss and for a detailed index, plaintiff's motion for summary judgment, and the parties' respective oppositions thereto; it appearing that plaintiff states a cause of action under Section 10(a) of the Administrative Procedure Act, *see Chrysler Corp.* v. *Brown*, 47 U.S.L.W. 4434, 4444 (U.S. April 18, 1979); it further appearing that 20 C.F.R. § 422.435(c) was not promulgated pursuant to any statute that was "intended to provide authority for limiting the

scope of § 1905," *Chrysler Corp.* v. *Brown, supra*, 47 U.S.L.W. at 4441-42; and it further appearing that plaintiff, through the affidavit of David Musgrave, has not established that release of the cost report in question will cause "substantial harm" to plaintiff's competitive position, it is hereby

ORDERED that defendants' motion to dismiss be and hereby is denied; and it is further

ORDERED that plaintiff's motion for summary judgment be and is denied; and it is further

ORDERED that the above case is set down for a status conference with counsel in chambers at 4:00 p.m. on May 24, 1979, to schedule further proceedings, if any, that may be required.

/s/ GABRIEL A. GESELL
Gabriel A. Gesell
United States District Judge

May 16, 1979.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HOSPITAL AFFILIATES INTERNATIONAL, INC., etc., et al.,
Plaintiffs,

v.

JOSEPH A. CALIFANO, JR., etc., et al.,
Defendants.

No. 77 C 3088

FILED
SEPTEMBER 28, 1979

H. Stuart Cunningham, Clerk United States District Court.

Vol. 7 No. 11.

National Health Lawyers Assn., 522 — 21st Street, N.W. Suite 708, Washington, D.C. 20006.

MEMORANDUM OPINION

Chicago Lakeshore Hospital (Chicago Lakeshore) and Riveredge Hospital (Riveredge), operated and owned by plaintiff Affiliated Midwest Hospitals, Inc. (Midwest), are providers of Medicare services pursuant to Title XVIII of the Social Security Act, 42 U.S.C. §1395h. Midwest is a wholly owned subsidiary of plaintiff Hospital Affiliates International, Inc. (International). Under the provisions of 42 U.S.C. §1395g and regulations promulgated at 20 C.F.R. §405.406, Chicago Lakeshore and Riveredge were required to and did provide cost reports to the defendant Secretary of HEW through the defendant Blue Cross Association (BCA). Defendant Health Care Service Corporation (HCSC) also acquired these cost reports by virtue of BCA's

delegation of a portion of its duties as a fiscal intermediary to HCSC.

Following notification by BCA and HCSC to Chicago Lakeshore and Riveredge of their intent, pursuant to the authority of 20 C.F.R. §422.435(c), to disclose the information contained in Chicago Lakeshore's and Riveredge's cost reports for the fiscal year ending December 21, 1976, plaintiffs filed this action on August 19, 1977 to enjoin the threatened disclosure of the cost reports or of the information contained in them for any purpose not inextricably tied to the Medicare program. On August 24, 1977, plaintiffs' motion for a temporary restraining order was granted, restraining defendants from disclosing the cost reports or information pending ruling on plaintiffs' motion for preliminary injunction.

On January 30, 1978, this Court granted plaintiffs' motion for a preliminary injunction. In finding that the plaintiffs had shown a sufficient likelihood of success on the merits to warrant a preliminary injunction, we held (1) that the documents and information were protected from disclosure pursuant to a right of non-disclosure implied from 5 U.S.C. §552(b) (4), (2) that the documents and information might well be protected from disclosure by virtue of 18 U.S.C. §1905 and 42 U.S.C. §1306, (3) that application of 20 C.F.R. §422.435 to justify disclosure was in excess of statutory authority since the regulation was ostensibly promulgated under the Freedom of Information Act (FOIA) and not 42 U.S.C. §1306, and since defendants had not shown that 42 U.S.C. §1306 could be construed as authority for the regulation, (4) that disclosure of the reports or information pursuant to 20 C.F.R. §422.435 might constitute an abuse of agency discretion, and (5) that §422.435 was invalid as inconsistent with other regulations promulgated by the defendant Secretary.

Subsequent to our granting the preliminary injunction, plaintiffs filed a motion for summary judgment and permanent

injunctive relief and defendants filed a motion to dismiss or for summary judgment. After the filing of these cross-motions, the United States Supreme Court granted certiorari in a case raising similar issues to those before the Court, *Chrysler Corp. v. Schlesinger*, 565 F.2d 1172 (3d Cir. 1977), *cert. granted sub nom. Chrysler v. Brown*, 435 U.S. 914 (1978), and we stayed ruling on the pending motions. Following the April 18, 1979 decision of the Supreme Court, *Chrysler v. Brown*, ____ U.S. ____, 99 S.Ct. 1705 (hereinafter *Chrysler*), the parties were given leave to file additional briefs on the impact of *Chrysler* on the issues before us. This case is now before the Court on plaintiffs' and defendants' cross-motions.

Impact on the Chrysler Decision

In *Chrysler*, the petitioner challenged regulations of the Department of Labor's Office of Federal Contract Compliance Programs which permitted certain affirmative action reports required of the petitioner as a precondition to doing business as a government contractor to be made available for public inspection under certain specified conditions. The petitioner challenged these regulations and the Department of Defense's determination that disclosure was permissible on grounds that (1) a proper construction of the FOIA gave the petitioner an implied right of non-disclosure since the information fell within one of the FOIA's exemptions and (2) the regulations relied upon by the respondents to justify disclosure did not satisfy the requirement of "authorized by law" within the meaning of the Trade Secrets Act, 18 U.S.C. §1905. The Supreme Court rejected petitioner's first contention, holding that the FOIA's listed exemptions neither created a private right of action to prevent governmental disclosure nor that the exemptions, specifically including Exemption 4 which covers trade secrets and commercial or financial information, could be construed as an implied limitation upon an agency's decision to disclose information within one of the exemptions. 99 S.Ct. at 1714. The Court also held that, under the facts of the *Chrysler* case, the regulations issued by the government which permitted disclosure of the affirmative action reports did not constitute "authoriz[ation] by law" within the meaning of 18 U.S.C. §1905. 99 S.Ct. at 1714-25. Accordingly, the Court remanded the case for a determination of whether the disputed information and reports fell within the scope of the Trade Secrets Act. 99 S.Ct. at 1726.

The *Chrysler* decision substantially narrows the issues before us. In holding that the FOIA's exemptions do not create an implied limitation upon an agency's discretion to disclose information, the Supreme Court overruled the rationale which had formed the first basis for our having granted plaintiffs' motion for a preliminary injunction.

The *Chrysler* decision also sets forth the analytic framework for determining whether and when administrative regulations can satisfy the "authorized by law" exception to 18 U.S.C. §1905.

18 U.S.C. §1905 provides:

> Whoever, being an officer or employee of the United States or any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent *not authorized by law* any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style or work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person *except as*

> *provided by law;* shall be fined not more than $1,000 or imprisoned not more than one year, or both; and shall be removed from office or employment. [Emphasis added.)

In *Chrysler*, the Supreme Court specifically held that formal agency action, such as that taken in the promulgation of regulations, could satisfy the "authorized by law" exception to §1905. 99 S.Ct. at 1717.

In order to provide the requisite "authoriz[ation] by law," the Court specified that an agency regulation must meet three requirements. First, the regulation must be "substantive," in that it affects "individual rights and obligations." 99 S.Ct. at 1718. Second, the regulation must be supported by a grant from Congress of the requisite legislative authority. *Id.* Third, the regulation must be promulgated in conformity with any procedural requirements imposed by Congress. *Id.*

Assuming *arguendo* that the cost reports at issue in this case contain material within the protection of 18 U.S.C. §1905, we have no difficulty determining that 20 C.F.R. §422.435 satisfies the first and third of the *Chrysler* requirements. Plaintiffs have not challenged the promulgation of §422.435 on grounds of procedural irregularity, nor do we perceive any procedural defect. *Brookwood Medical Center v. Califano,* No. C 78-2184A (Memo. Op. at 4, N.D. Ga. May 25, 1979) (hereinafter *Brookwood*). Plaintiffs' argument that §422.435 is "procedural," rather than "substantive," is without merit. In light of the Supreme Court's holding in *Chrysler* that the disclosure regulations there at issue were substantive, there is no basis on which to conclude that §422.435 does not equally affect "the public's right to information" and the "confidentiality rights of those who submit information." 99 S.Ct. at 1718. *Brookwood, supra* at 4. *See Cedars Nursing & Convalescent, Inc. v. Aetna Life & Casualty,* No. 79-1416 (Mem. Op. at 3, E.D. Pa. May 7, 1979) (hereinafter *Cedars*).

The issue of whether §422.435 satisifies the second *Chrysler* requirement presents a closer question. Defendants presently[1] argue that §422.435 is "reasonably within the contemplation of [the] grant of authority" contained in 42 U.S.C. §1306. *Chrysler, supra,* 99 S.Ct. at 1720. Plaintiffs contend, however, that §1306 does not provide the requisite statutory authority because the legislative history of §1306 demonstrates that Congress "was not concerned with public disclosure of trade secrets or confidential business information." *Id.*

Since the plaintiffs' formulation of the second *Chrysler* requirement insofar as what constitutes the necessary grant of legislative authority is stricter than that urged by the defendants, review of the *Chrysler* decision on this point is essential. In *Chrysler,* the Supreme Court rejected the respondents' contention that section 201 of Executive Order 11246 provided justification for promulgation of the disclosure regulations at issue:

> The pertinent inquiry is whether under any of the arguable *statutory* grants of authority, the OFCCP disclosure regulations relied on by the Government are

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[1]Prior to the *Chrysler* decision, the defendants had argued that 20 C.F.R. §422.435 was also "authorized by law" by virtue of the FOIA and 5 U.S.C. §301. Defendants have now abandoned their reliance upon either of these statutes. In light of *Chrysler's* conclusions both that the FOIA's exemptions were merely discretionary as to agency disclosure and could not provide congressional authority for purposes of 18 U.S.C. §1905, 99 S.Ct. at 1719, and that 5 U.S.C. §301 was solely a "housekeeping" statute and not a substantive grant of legislative power to issue disclosure regulations, 99 S.Ct. at 1723, any continued reliance upon either statute would be ill-founded.

Defendants do not now argue that either 42 U.S.C. §§405 or 1302 provide the requisite statutory authorization for §422.435, even though these two statutes were mentioned in the course of the promulgation of §422.435. 40 Fed.Reg. 27648, 27649 (July 1, 1975). *See also* 40 Fed.Reg. 17849, 17850 (April 23, 1975). Therefore, we do not consider whether either of these statutes is a substantive grant of legislative power to issue disclosure regulations. At least one court has found them insufficient. *Brookwood, supra* at 4.

> reasonably within the contemplation of that grant of authority. We think that it is clear that when it enacted these statutes, Congress was not concerned with public disclosure of trade secrets or confidential business information, and, unless we were to hold that any federal statute that implies some authority to collect information must grant *legislative* authority to disclose that information to the public, it is simply not possible to find in these statutes a delegation of the disclosure authority asserted by the Government here.

99 S.Ct. at 1720. While some of this language might imply a strict test to determine whether a given disclosure regulation is supported by a specific statutory grant, the Supreme Court further qualified its holding:

> This is not to say that any grant of legislative authority to a federal agency by Congress must be specific before regulations promulgated pursuant to them can be binding on courts in a manner akin to statutes. What is important is that the reviewing court reasonably be able to conclude that the grant of authority contemplates the regulations issued. 99 S.Ct. at 1721.

This latter language clearly indicates that something less definite than an express grant of Congressional authority may be sufficient. *Brookwood, supra* at 5.

Upon our review of §1306, its legislative history, and relevant case law, we cannot conclude that §1306 "reasonably contemplates" 20 C.F.R. §422.435. §1306(a) provides, in pertinent part,

> No disclosure . . . of any file, record, report or other paper, or any information, obtained at any time by the Secretary of Health, Education, and Welfare, or the Secretary of Labor, or by any officer or employee of the Department of Health, Education, and Welfare or the Department of Labor in the course of discharging their respective duties under this chapter, and no disclosure of any such file, record, report, or other paper, or information, obtained at any time by any person from the

> Secretary of Health, Education, and Welfare or the Secretary of Labor, as the case may be, or from any officer or employee of the Department of Health, Education, and Welfare or the Department of Labor shall be made *except as the Secretary of Health, Education, and Welfare* or the Secretary of Labor, as the case may be, *may by regulations prescribe*. . . . [Emphasis added.]

Section 1306(a) does on its face deal specifically with the issue of disclosure of records and information within the defendant Secretary's possession. In this regard, §1306(a) is far more specific than either 5 U.S.C. §301 or the statutory foundations for §201 of E.O. 11246 which were found inadequate in *Chrysler*. Section 1306(a) also specifically admits of the disclosure pursuant to regulation of information within the Secretary's possession which otherwise is protected from disclosure. Notwithstanding the facial language of §1306(a) contemplating some authority on the Secretary's part to disclose information within his possession, nothing in that statutory language resolves the issue of whether, by allowing for certain authority to disclose, Congress thereby also intended to authorize disclosures of information held confidential under some other statute such as 18 U.S.C. §1905. Section 1306(a) clearly contains no express grant of Congressional authority to disclose information which is covered by 18 U.S.C. §1905.

Plaintiffs contend that the legislative history of §1306 demonstrates that §1306 does not provide the requisite Congressional delegation of authority for the promulgation of regulations which would authorize the disclosure of confidential business information. Plaintiffs rely heavily on the legislative history surrounding the enactment of §1306 in 1939, the amendments of §1306 in 1950 and 1972, and the enactment of 42 U.S.C. §1320a in 1977. Defendants equally contend that §1306's legislative history supports the conclusion that §1306 does

provide an adequate delegation of Congressional authority for the promulgation of 20 C.F.R. §422.435.[2]

Review of the legislative history of §1306 prior to the enactment of the Medicare program in 1965 indicates that at no point did Congress ever specifically consider whether §1306 would give the Secretary[3] discretion to disclose confidential business information which would otherwise be protected from disclosure by the Trade Secrets Act.[4] When §1306 was enacted in 1939, the Social Security program to which §1306 applied was not very complex and the information gathered was primarily personal in nature. *See* 40 Fed. Reg. 17849, 17850 (April 23, 1975).

Plaintiffs accurately characterize the original thrust of §1306 as primarily designed to insure the nondisclosure, except under limited circumstances, of information within the Secretary's possession. Both the House and Senate reports in support of §1306's enactment stated that disclosure was to be prohibited "except pursuant to Board regulations," H. Rep. No. 728, 76th Cong., 1st Sess., at 77 (June 2, 1939); S. Rep. No. 734, 76th Cong., 1st Sess., at 88 (July 7, 1939), and that such regulations would

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[2]Plaintiffs' emphasis upon §1306's legislative history is consistent with the Supreme Court's approach in *Chrysler*. *See* 99 S.Ct. at 1721 (discussion of *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

[3]"Secretary" is used loosely to include the predecessors in capacity of the present Secretary of HEW under §1306. A review of the successive reorganizations of the Social Security Act and their effect on §1306 is found in *Westchester General Hospital v. HEW*, 464 F.Supp. 236, 254 n.7 (M.D.Fla. 1979).

[4]The Trade Secrets Act, 18 U.S.C. §1905, was enacted in its present form in 1948. Prior to 1948, the origins of the Trade Secrets Act are to be found in separate statutes which controlled the disclosure of specified business information gathered by Government revenue officers, the Tariff Commission, and the Department of Commerce. *See Chrysler, supra*, 99 S.Ct. at 1715-16 (legislative history of 18 U.S.C. §1905).

only allow disclosure "under certain conditions related to proper administration." H. Rep., at 32; S. Rep., at 39. While plaintiffs' claim that this emphasis upon "proper administration" means that §1306's original ambit insofar as authorizing discretionary disclosures was confined to that of an internal "housekeeping" statute is not persuasive, nothing in the language or history of §1306 as originally enacted indicates that Congress contemplated giving the Secretary authority to disclose confidential business information gathered in the course of the department's activities.

Similarly, the legislative history of the 1950 amendments to the Social Security Act at no point indicates that Congress understood §1306 to delegate to the Secretary authority to disclose confidential business information. In 1949, the House proposed to enact a new §1308 which would specifically have authorized the Secretary to release wage information to state unemployment agencies upon request and to conduct special studies and compile statistical data with respect to any matter covered by the Social Security Act, which studies could be disclosed pursuant to the Secretary's regulation, but only when such disclosure would not have violated §1306. The House's proposal would have retained §1306 without substantive change. H. Rep. No. 1300, 81st Cong., 1st Sess., at 156 (August 22, 1949). The Senate, while in large part adopting the House's version of the proposed §1308, proposed to limit the Secretary's authority to disclose under §1306 solely to such disclosures as would be authorized under the proposed §1308. S. Rep. No. 1669, 81st Cong., 2d Sess., at 180-81 (May 17, 1950), *reprinted* in U.S. Code Cong. & Admin. News 3287, 3481-82 (1950). While one court has construed the Senate's effort to narrow §1306 as indicating that Congress understood §1306 as giving the Secretary broad disclosure authority, *Westchester General Hospital v. HEW*, 464 F. Supp. 236, 254 n.7 (M.D. Fla. 1979), in light of both the ambiguous House proposal to which the Senate's counter-proposal

was directed and in light of the fact that the final conference version of §1306 both "retained existing law" with respect to the Secretary's discretionary authority under §1306 for disclosure of information pursuant to regulation and scrapped the proposed §1308, Conf. Rep. No. 2771, 81st Cong., 2d Sess., at 120 (August 1, 1950), *reprinted* in U.S. Code Cong. & Admin. News 3482, 3511 (1950), we find that court's conclusion unwarranted. Nothing in the legislative history of the 1950 amendments to §1306 indicates that Congress understood §1306 to confer the authority which defendants argue it confers.

Insofar as the legislative history of §1306 after the enactment of the Medicare program in 1965 is concerned, plaintiffs contend that the addition of subsections (d) and (e) by the 1972 amendments to §1306 would have been unnecessary had the Secretary had the authority to disclose confidential business information. Subsections (d) and (e), which provide that the Secretary *shall* make available to the public certain official reports bearing on the performance of Medicare contractors, were first proposed by the Senate after the House had completed its consideration of potential amendments to the Social Security Act. The Senate report states with respect to the previous unavailability of these reports merely that "these evaluations and reports are not available to the public in general." S. Rep. No. 92-1230, 92nd Cong., 2d Sess., at 64 (September 26, 1972). The Senate report thus does not indicate whether it considered these reports to have been unavailable because the Secretary had lacked the authority to disclose them pursuant to regulation or because the Secretary had merely failed to exercise authority which he then possessed. While there is no necessary inconsistency between the enactment of subsections (d) and (e) and the conclusion that §1306(a) provides the Secretary with the requisite delegation of authority, defendants have pointed to no legislative history nor have we found any which affirmatively supports the conclusion that §1306 contemplates the promulgation of regulations

authorizing disclosure of information which would otherwise be protected by 18 U.S.C. §1905.[5]

[5]While plaintiffs have argued strenuously that the enactment of 42 U.S.C. §1320a compels the conclusion that §1306 does not provide the requisite grant of legislative authority for the promulgation of 20 C.F.R. §422.435(c), we do not rely upon this portion of plaintiffs' argument in reaching our conclusion. By enacting §1320a, Congress established a system whereby providers of services under the Social Security laws are to become subject to a uniform system of reporting cost and other information. Congress also specifically provided that the information furnished to the Secretary in the uniform reports was to be made available by the Secretary to health systems agencies and to state health planning and development agencies. *See* 42 U.S.C. §1320a(c). While §1320a is thus concerned with dissemination of Medicare cost information, the legislative history of this section shows that the preponderant concern behind its enactment was the desire for uniform reporting.

After the House was already considering H.R. 3, which provided the background for the Medicare-Medicaid Antifraud and Abuse Amendments of 1977, Congressmen Moss and Rogers on March 1, 1977 introduced H.R. 4211, which provided the general framework for the ultimate version of §1302a. Testimony was given at the hearings on H.R. 3 as to the importance of uniform reporting by providers of services as a way to reduce and monitor costs. *See* Joint Hearing Before Subcommittee on Health, Committee on Ways and Means, and the Subcommittee on Health and the Environment Committee on Interstate and Foreign Commerce, 95th Cong., 1st Sess. at 12, 15, 158, 219-24 (remarks of Secretary Califano, Howard N. Newman, and Representative Moss). After the completion of the hearings, the staff report to the subcommittee of the House Ways and Means Committee indicated that a uniform reporting amendment had received favorable testimony during the hearings, and specifically alluded to Rep. Moss' proposed amendment. Staff Report of Subcommittee on Health of the House Ways & Means Committee on H.R. 3, 95th Cong., 1st Sess. at 29 (March 28, 1977). Subsequently, the substance of the Moss bill was incorporated as §19 of both H.R. 3 and S. 143, the Senate counterpart to H.R. 3. The discussions in the committee reports of §19 emphasize the uniform reporting aspect of the proposed legislation, and never gave the disclosure aspects more than passing consideration.

Under such circumstances, we are not inclined to give the enactment of §1320a(c) substantial weight as to the proper construction of §1306, although it is true, as plaintiffs contend, that the provisions for limited disclosure in §1320a would have been unnecessary if §1306 authorized the broad disclosure provisions of 20 C.F.R. §422.435(c).

Finding no support in §1306's legislative history for the conclusion that §1306 "reasonably contemplates" 20 C.F.R. §422.435, we turn finally to the decisions of those courts which have addressed the precise issue before us. Two district courts since *Chrysler* have held, without apparent consideration of §1306's history, that §1306 provides the requisite "authorization by law" so as to justify §422.435 notwithstanding 18 U.S.C. §1905. *Brookwood, supra* at 5; *Cedars, supra* at 4. One district court has reached the opposite conclusion on grounds that (1) there is no indication in §1306's history that Congress intended to limit §1905's applicability and (2) that Congress in 1972 did not adopt Senator Ribicoff's proposed amendment to limit the scope of §1306. *Washington Hospital Center v. Mutual of Omaha*, No. 78-2485, at 1-2 (D.D.C. June 25, 1979). While we place little weight on the latter court's second ground,[6] we believe its decision based upon consideration of §1306's legislative history reaches the proper result.

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[6]During the consideration of the legislation which resulted in the 1972 amendments of the Social Security Act, including the enactment of subsections (d) and (e) of §1306, Senator Ribicoff clearly expressed his dissatisfaction with the fact that §1306's non-disclosure provisions applied equally to information gathered from individual recipients as to information provided to the Secretary by providers of services. 118 Cong. Rec. 1027 (Jan. 25, 1972). Senator Ribicoff apparently proposed to the Senate Finance Committee an amendment to §1306 which would have expressly limited that section to prohibiting disclosures of information pertaining to specific beneficiaries and taxpayers. The Senate Finance Committee did not accept Senator Ribicoff's proposal. *See* S.Rep. No. 92-1230, 92nd Cong., 2d Sess. at 1275 (Separate views of Senator Ribicoff.) There is no indication that Senator Ribicoff ever brought his proposal to a vote by the entire Senate.

In light of the radical departure which Senator Ribicoff's proposal would have made in the meaning of §1306, we are not prepared to consider the Senate Finance Committee's failure to adopt his proposal as bearing significantly upon the issue of whether §1306 delegates authority to the Secretary to disclose information which would otherwise be confidential under 18 U.S.C. §1905.

Since neither the statutory language nor the legislative history of §1306 at any point indicates either that Congress ever specifically considered whether §1306 gave the Secretary authority to disclose confidential business information otherwise statutorily protected from disclosure by 18 U.S.C. §1905 or that Congress intended by enacting §1306 to vest in the Secretary something other than a limited discretion to disclose pursuant to regulation, we conclude that §1306 does not provide the requisite delegation of legislative authority for HEW's promulgation of 20 C.F.R. §422.435(c), so as to allow disclosure of material which would otherwise be protected by 18 U.S.C. §1905. In short, we are unable to conclude that §1306 "reasonably contemplates" the issuance of 20 C.F.R. §422.435(c).

Remaining Issues

Having concluded that 20 C.F.R. §422.435(c) does not provide the requisite "authorization by law" to exempt the defendants' threatened disclosure of the plaintiffs' Medicare cost reports from the prohibitions of the Trade Secrets Act, we need not reach the plaintiffs' further argument that, assuming §422.435(c) did constitute "authorization by law," the defendant Secretary's promulgation of that regulation constituted an abuse of agency discretion. We must, however, reach the issue of whether the information contained in the plaintiffs' Medicare cost reports is, in fact, protected by the Trade Secrets Act.

While plaintiffs contend that the defendants have conceded that these Medicare cost reports contain privileged and confidential information within the protection of 18 U.S.C. §1905, defendants' supplemental memorandum on the impact of *Chrysler* clearly indicates that defendants have made no such concession. Accordingly, the defendants shall have twenty (20) days in which to present further briefing as to why the plaintiffs' Medicare cost reports do not fall within the protections of 18

U.S.C. §1905. Plaintiffs shall have twenty (20) days thereafter to file an answering brief, and defendants shall have ten (10) days to reply.

An appropriate order will enter.

Sept. 28, 1979

/s/ HERBERT SEWILL
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE DIPLOMAT LAKEWOOD, INC. d.b.a. THE ARISTOCRAT NURSING HOME – LAKEWOOD

Plaintiff

v.

BLUE CROSS OF NORTHEAST OHIO

Defendant

C77-718

Judge Thomas

MEMORANDUM AND ORDER

The Diplomat Lakewood, Inc. operates the 129 bed Aristocrat Nursing Home – Lakewood (hereinafter Aristocrat – Lakewood) at 13900 Detroit Avenue, Lakewood, Ohio. As a "provider" of Medicare services under Title XVIII of the Social Security Act, 42 U.S.C. §1395, et seq., it is required by section

1815 of Title XVIII, 42 U.S.C. §1395g and 20 C.F.R. §404.406(b) to prepare and file an annual cost report with defendant Blue Cross of Northeast Ohio. Pursuant to section 1861 of Title XVIII, 42 U.S.C. §1395h, defendant Blue Cross serves as a fiscal intermediary between providers and the Department of Health, Education and Welfare (HEW) for approximately thirty-eight northeast Ohio Medicare providers. Since Blue Cross acts as an agent for HEW, HEW has intervened in this action as the real party in interest.

Aristocrat – Lakewood, Aristocrat – South, and Aristocrat – West are each owned and operated by the Coury family. A fifty percent interest in a similar provider in Canton, Ohio, is also owned by the Courys. The general administration of all these skilled nursing facilities (purchasing, bookkeeping, management, etc.) is provided by Aristocrat Management Services, Inc., a separate entity which is also owned and operated by the Coury family.

Defendant Blue Cross received a request from Mr. Frederick E. Krizman, executive director of St. Augustine Manor, a nursing home (194 beds) located at 7818 Detroit Avenue, Cleveland, Ohio. The request was for a copy of the annual cost report of Aristocrat – Lakewood. On June 16, 1977, defendant Blue Cross notified

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[1]Blue Cross has provided the court and parties with 1976-1977 totals of patient days and Medicare dollars for the thirty-eight skilled nursing facilities (extended care facilities), also called Medicare providers, which Blue Cross services in northeastern Ohio as Medicare intermediary for HEW. The lists reveal that ten of the thirty-eight facilities provide eighty percent of the Medicare patient days and the same ten facilities received eighty-eight percent of the Medicare reimbursement dollars. St. Augustine leads each list. In total patient days, Aristocrat-South is third and Aristocrat-West and Aristocrat-Lakewood are fifth and sixth. In receipt of Medicare dollars, Aristocrat-South, Aristocrat-West and Aristocrat-Lakewood rank respectively fifth, sixth and seventh. The Blue Cross letter of November 2, 1977, and its attached schedules have been received into evidence after the end of trial as court's exhibits Nos. 1, 2 and 3.

the plaintiff that on July 6, 1977, ten working days after it received the required ten dollar payment, it would mail the report to the requester. The notification stated that the request for the "most recent cost report" was received "under the provision of section 1106 of the Social Security Act and the Freedom of Information Act."

On June 30, 1977, the plaintiff brought its action to enjoin and restrain defendant Blue Cross "from releasing or disclosing to any third party or parties any provider cost report of Plaintiff or any portion of such report." Plaintiff alleges that this court has jurisdiction under both the APA 5 U.S.C. 5701 et seq. and federal question jurisdiction, 28 U.S.C. §1331. Because plaintiff asserts that release of the cost report is barred by the Freedom of Information Act, 5 U.S.C. §552(b) (4), and by provisions of 18 U.S.C. §1905, Trade Secrets Act, jurisdiction is found to exist pursuant to section 1331.[2]

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[2]*Califano, Sec. HEW v. Sanders*, No. 75-1443 (Sup. Ct. Feb. 2, 1977), holds that "an act of Congress enacted since our grant of certiorari in this case now persuades us that the better view is that the APA is not to be interpreted as an implied grant of subject matter jurisdiction to review agency actions." *Id.* at p. 6. While concluding that "the APA does not afford an implied grant of subject matter jurisdiction permitting federal judicial review of agency action," *id.* at p. 8, the court also observed

> On October 21, 1976, Congress enacted Pub. L. 94-574, 90 Stat. 2721, which amends 28 U.S.C. §1331 (a) to eliminate the requirement of a specified amount-in-controversy as a prerequisite to the maintenance of "any [1331] action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity." The obvious effect of this modification, subject only to preclusion-of-review statutes created or retained by Congress, is to confer jurisdiction on federal courts to review agency action, regardless of whether the APA of its own force may serve as a jurisdictional predicate. We conclude that this amendment now largely undercuts the rationale for interpreting the APA as an independent jurisdictional provision.

Id. at 6-7. Hence this court concludes that section 1331 confers jurisdiction on this court to review HEW's agency action in adopting 20 C.F.R. §422.435.

Plaintiff also claims that the HEW regulation (20 C.F.R. §422.435)[3] which "purports to authorize" the release by financial intermediaries of provider cost reports to third parties, is unlawful and invalid under subsections (A) and (C) of section 706(2) of the Administrative Procedure Act. It is claimed that the regulation exceeds the statutory jurisdiction and authority of the Secretary of Health, Education and Welfare, in that the purported authorization is violative of 5 U.S.C. §552(b) (4) and 18 U.S.C. §1905.

The case has been tried on a record consisting of stipulated facts, oral testimony, and documentary exhibits. Subsequent to the receipt of proposed findings of fact and conclusions of law, the case was argued orally by counsel on November 8, 1977.

A.

Regulations Nos. 1 and 22 of the Social Security Administration concern disclosure of information by the agency. Subsequent to notice of a proposed rule-making hearing to amend these regulations, the secretary adopted and approved amendments to be effective as of July 31, 1975. The amended Rule 1 was codified as "Disclosure of Official Records and Information," 20 C.F.R. §401 (1977), and the amended Rule 22 was codified as certain regulations under "Subpart E — Availability of Information and Records to the Public," 20 C.F.R. §422.401, et seq. (1977). Section 401.1 of Part 400 recognizes that the

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[3]20 C.F.R. 5422.435:

> The following shall be made available to the public under the conditions specified:
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> • • • •
>
> (c) Upon request in writing, cost reports submitted by providers of services pursuant to section 1815 of the Act to enable the Secretary to determine amounts due such providers.

Secretary relied on section 1106(a) of the Social Security Act (42 U.S.C. §1306(a)) as authority for prescribing "rules for the disclosure of information protected from disclosure by section 1106(a)."[4]

The rules of Part 401 "apply to information obtained by officers or employees of the Department in the course of administering title[s] ... XVIII of the Social Security Act, [including] information obtained by Medicare intermediaries...." It is specified that "the procedural rules in Part 422, Subpart E, of this chapter, shall be applied to requests for information which is subject to the rules for disclosure in this part."

The general rule, specified by section 401.3(a), applies the Freedom of Information Act to all proposed information disclosures, and then provides:

> If, considering the circumstances of the disclosure, the information would be made available in accordance with the Freedom of Information Act rules, then the information may be disclosed regardless of whether the requester or recipient of the information has a statutory right to request the information under the Freedom of Information Act, 5 U.S.C. 552, or whether a request has been made.

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[4]Section 1106(a) of the Act, 42 U.S.C. §1306(a) reads:

> No disclosure of any ... file, record, report or other paper, or any information, obtained at any time by the Secretary of Health, Education, and Welfare, ... or by any officer or employee of the Department of Health, Education, and Welfare ... in the course of discharging their respective duties under this chapter, ... shall be made except as the Secretary of Health, Education, and Welfare ... as the case may be, may by regulations prescribe .... Any person who shall violate any provision of this section shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not exceeding $1,000, or by imprisonment not exceeding one year, or both.

This indicates a clear intent to apply the Freedom of Information Act tests of disclosure, even when HEW acts to disclose information other than under the Freedom of Information Act. The application of the general rules is section 401.3(b)(2):

> Unless prohibited by any other statute ... information may be disclosed to any requester or recipient of the information ... when the information would not be exempt from mandatory disclosure under Freedom of Information Act rules or ... when the information nevertheless would be made available under the Department's public information regulation's criteria for disclosures which are in the public interest and consistent with obligations of confidentiality and administrative necessity, 45 C.F.R. Part 5, Subpart F, as supplemented by Part 422, Subpart E of this Chapter [422.435 in particular].

Falling within the wording "Unless prohibited by any other statute," Title 18 section 1905 which prohibits agency disclosure of information "unless authorized by law" will be applied *infra*, in part C. Shortly, attention will be given to whether Aristocrat — Lakewood's Medicare provider cost report falls within the exemption from mandatory disclosure under Freedom of Information Act rules ("the substantive mandatory disclosure provisions of the Freedom of Information Act, 5 U.S.C. 552 (including the exemptions from mandatory disclosure, 5 U.S.C. 552(b)"). 20 C.F.R. §401.2. However, at this point it is essential to take up the third part of section 401.3(b)(2) providing "when the information nevertheless would be made available under the Department's public information regulation's criteria for disclosure which are in the public interest and consistent with obligations of confidentiality and administrative necessity." Characterized as the Application of the General Rule," it is found to be just that. Hence the third part of section 401.3(b)(2)

does not modify or restrict the unlimited order of disclosure of Medicare provider cost reports contained in section 422.435(c).[5]

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[5]The secretary's comments of June 11, 1975, prefacing the promulgation of section 422.435 effective July 31, 1975, appear at 40 Fed. Reg. 27648-649. The Secretary thus recognizes the content of (b) (4):

> The Freedom of Information Act would seem to require that these records [Medicare cost reports] be made available, except that they may be withheld to the extent that they contain commercial or financial information which is privileged or confidential.

Id. at 27649. Without further addressing the FOIA (b) (4) exemption, or the question of whether all or any part of the Medicare providers annual cost report embraces confidential commercial or financial information, the secretary rests his entire case for total disclosure of the cost report on two broad points. First the secretary states:

> However, the Social Security Administration has concluded that it is not in the public interest to withhold the reports from the public. The reimbursement or provider costs, the amount of which is determined through analysis of cost report data, is a public business, and, as such, the records involved in the process of implementing this part of the program should be public records.

Id. at 27649. The undisputed evidence in this case demonstrates that analysis of cost report data and verification thereof is now required before authorizing reimbursement. This function is performed by the HEW appointed fiscal intermediary — in this case, Blue Cross of Northeastern Ohio. Upon receipt by the intermediary, a desk review is first performed, including comparisons with prior provider years. Then field audits may be and are scheduled to examine and verify invoices and cancelled checks. All this is to assure that the reported costs are accurate and actually incurred rather than fabricated. In short, Blue Cross's function is to protect the government and the Medicare dollars.

The second broad point upon which the secretary justifies section 422.435 (c) is:

> Providers participating in Medicare and submitting such reports received a total of $6,821,463,000 for fiscal year 1973. An expenditure of public funds of this magnitude carries with it a corollary that the public assure itself the funds are properly paid.

Footnote continued on next page—

B.

The Freedom of Information Act directs each agency to make available to the public "final opinions," "statements of policy and interpretations," "administrative staff manuals and instructions," and other identifiable information. However, section 552(b) establishes nine exempted categories to which section 552 does not apply. Among these exemptions is (b) (4) which reads: "Trade secrets and commercial or financial information obtained from a person and privileged or confidential."

Relying on (b) (4), plaintiff contends that "release or disclosure by defendant of plaintiff's provider cost report to third parties is [thereby] barred." This is not a correct reading of (b) (4). Courts now recognize that the exemptions of section 552(b) "protect

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—*Footnote continued from preceding page*

Id. at 27649. Examination of the cost report form and the 1975-76 cost report of Aristocrat-Lakewood reveals that the existing power of audit of the cost report by the fiscal intermediary, and indeed by HEW itself, is likely to assure that the public funds are properly paid. Examination of a cost report by a requester could not duplicate such an audit. Given the extent and complexity of the annual cost report (an exhibit in this case), it is manifest that the power to conduct a field audit of a Medicare provider and the timely performance thereof by HEW or its intermediary provides a specific means to "assure" the public that the almost seven billion dollars per year in public Medicare payments "are properly paid."

Despite this court's belief that the Secretary's comments do not justify the unlimited disclosure of the Medicare provider's cost report authorized in section 422.435 (c), and even though the categorical application of this regulation does not allow a Medicare provider to rely on exemption (b) (4) to demonstrate that competitive harm to the provider may result from such a disclosure, this court does not conclude that the record would support a finding that the adoption of section 422.435 (c) is an abuse of the secretary's discretion requiring an invalidation of the regulation. HEW's administrative expertise, which must be assumed, and the deference due such an administrative regulation bolster this conclusion.

against required disclosure, not against disclosure."[6] A person may not force an agency to disclose information exempted under section 552(b); but an agency is not forbidden by the Freedom of Information Act from voluntarily disclosing the information. Thus it is concluded that section 552(b) (4) does not invalidate 20 C.F.R. section 422.435(c) even though a Medicare provider's cost report falls within its exemption.

Nevertheless, the analysis of 18 U.S.C. §1905, *infra*, makes it timely to now consider the facts of record to determine whether Aristocrat — Lakewood's Medicare cost report falls within the exemption of section 552(b) (4). In claiming that the annual cost report is confidential commercial or financial information exempt under (b) (4), plaintiff relies on the definition of confidentiality applied to (b) (4) in *National Parks & Conservation Assoc. v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) and followed in *Charles River Park "A", Inc. v. Department of H.U.D.*, 519 F.2d 935, 940 (D.C. Cir., 1975). As pertinent here, that definition reads:

> [C]ommercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely . . . to cause substantial harm to the competitive position of the person from whom the information was obtained.

It is appropriate to review the testimony bearing upon Aristocrat — Lakewood's claim that it will sustain substantial harm to its competitive position in the event that its cost report is released to the requester — St. Augustine Home and its executive director. The two nursing homes are located on Detroit

[6]This statement of K. Davis, Administrative Law Treatise §3A.5 (1970 Supp.) is quoted and accepted in *Charles River Park "A", Inc. v. Department of H.U.D.*, 519 F.2d 935, 941 (D.C. Cir. 1975). See also unpublished opinion in *Parkridge Hospital, Inc. v. Blue Cross and Blue Shield of Tennessee;* and *Joseph A. Califano, Jr., Secretary of Health, Education and Welfare*, CIV-1-77-85 (E.D. Tenn. April 15, 1977).

Avenue approximately four miles apart. John Coury, the president of plaintiff corporation, describes St. Augustine as Aristocrat — Lakewood's closest competitor. This statement is not contradicted. The two homes draw Medicare patients from the same hospitals — St. John's, Lakewood Hospital, Fairview Park, and Lutheran Hospital.

Mr. Coury characterized Aristocrat — Lakewood as a profitable enterprise that has a present occupancy rate of about ninety-seven percent. He attributes the profitability to changes in methods of operation that were directed by Samuel Laderman after many hours of study by persons connected with the home.

Samuel Laderman, an attorney at law and a certified public accountant and his staff perform accounting, legal, and management services for Aristocrat — Lakewood, the other identified Coury-owned extended care facilities, and their Aristocrat Management Services, Inc. Of the fourteen man-days per month that Mr. Laderman and his staff devote to these services, he estimates that fifty percent of the time of himself and his staff is spent in performing management services.

Mr. Coury stressed the vital need for extended care facilities. Despite current shortage of Medicare beds, however, the number of Medicare providers in Cleveland has declined over the years. Each of the Coury homes maintains a "distinct part" (i.e., Medicare portion or "certified part"), even though he says the profit is taken out of the Medicare program. Mr. Laderman stated that, "We do lose money on each Medicare patient." Nevertheless, maintenance and operation of a distinct part is considered an asset. Although it is run at a slight loss, the distinct part provides a source of new patients in the non-certified part. Moreover, he noted that the distinct part is mainly concerned with rehabilitation. It is a happy work. Considerable physical therapy, speech therapy, and other special services are provided. In short, it tones up the whole institution.

Thus it is evident that proprietary nursing homes serve a public purpose by providing Medicare, Medicaid and private services. Of course, such proprietary homes can only continue to operate if they are profitable. Accordingly, it is essential to foster and encourage the existence of efficient and well-run nursing facilities that combine the efficiency of a private organization with the performance of a public service. Public policy and welfare are benefited by promoting well-run facilities that can provide both skilled nursing care in the distinct part and sufficient and satisfactory nursing and custodial care in the non-certified part. Hence, it is paramount to carefully assess any potential harm that may befall Aristocrat — Lakewood if St. Augustine, its close competitor, receives a copy of Aristocrat — Lakewood's cost report.

Mr. Coury was asked what a person with his cost report could do to duplicate his services. He answered that the biggest factor was that they would "work off the figures." The detailed accounting in the report serves to raise flags. Another person could determine from the report if his own home was efficient in a particular department, e.g., if food costs were too high, or there was too much help in the kitchen. If you have a guide, you know where to look. As a guideline, the report enables one to assess and compare his own operation with that of the reporting provider on a department-by-department basis. Thus, in effect, the flags allow one to concentrate his own efforts to achieve a cost-production goal in any given area that he knows is achievable because another provider has already reached that goal.

Mr. Laderman explained at length the advantages of having access to a competitor's cost report. Asked what a person trained in accounting could glean from the annual cost report to operate another nursing home, he answered, "At first it could be determined whether or not it was a profitably run provider." Since all expenses are listed by departments for both the distinct

part and non-certified part of the facility, it is a simple matter to determine the costs per patient-day for each type of expense in both the distinct part and the non-certified part of the facility.

Placing himself in the position of a trained accountant, conversant with such a report, Laderman examined each schedule and explained how it would assist him in advising his client in various aspects of operating a provider's facility. For example, with reference to nursing services, he explained that the report would permit him to decide what size nursing staff was needed per patient-day to render good health care. He noted that if the cost reporter's staff was smaller than his own staff that he would be directed toward a re-examination of the floor area covered by the nursing service to determine why his client's operation was at variance with the smaller number of nursing hours indicated in his competitor's report.

Mr. Laderman testified that the annual cost report could provide a competitor with a per-patient-day breakdown of income and expense items for both the extended care or distinct part and the other parts of the institution. He added that within two hours time a study of the report would permit him to break out the detailed cost per patient-day for every department rendering service to a patient. Asked if the information would be valuable, he answered, "Yes, it would."

Mr. Laderman explained that to maintain profitability it was important to select the right mix between the patient beds devoted to Medicare and the patient beds in the non-certified part of the facility. His testimony is that patient mix is considered important and that the mix is revealed in the cost report.

In both the direct and cross-examinations of Mr. Laderman, the competitive advantage of using central management and central purchasing was admitted. Mr. Coury also indicated that the effects of bulk buying would be reflected in costs per bed, and

that without bulk buying another home could not duplicate his cost per patient bed.[7]

Executive director Krizman of the St. Augustine Manor was informed by Blue Cross in January 1977 that a Cleveland accountant had requested the cost report for St. Augustine Manor as well as several other facilities. Mr. Krizman indicated that his initial response was to oppose the request. He changed his opinion after reviewing the regulations while keeping in mind that Medicare funds involve expenditure of public funds. He believes that the St. Augustine Manor report was released soon thereafter. Asked if any harm of any kind had resulted, "None that I know of. No effect whatsoever." There is no evidence in the record that the requester was acting for any competitor of St. Augustine Manor; and there is no evidence as to what use, if any, was made of the cost report of St. Augustine Manor by the accountant who requested it.

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[7]Cross-examination of Mr. Coury on this point by government counsel thus concluded:

> Q: So, therefore, someone who looked at this cost report for only those facilities could not actually duplicate that cost per person per bed unless they were sharing costs with two other nursing homes?
>
> A. Well, if you are putting it in that sense, yes but it still tells them they are high in that particular area. If they are high or if the costs were higher.
>
> Q. But they [sic] are intangibly [sic] such as the fact that you share costs with two other nursing homes?
>
> A. Yes.

However, it is noteworthy that though St. Augustine is a single home while the Courys manage three homes in the Cleveland area, St. Augustine could also be buying in bulk. This is revealed by Blue Cross's summarization of the patient-days of service rendered by each of the largest providers: St. Augustine 20,444 patient-days; Aristocrat-South 11,827 patient-days; Aristocrat-West 10,073 patient-days; and Aristocrat-Lakewood 8,709 patient-days.

When asked why he had requested the Aristocrat-Lakewood cost report, Mr. Krizman answered that it was because he does a lot of teaching. His intended use of the cost report, however, is not merely academic. That his likely use of the data as director of St. Augustine Manor would be for competitive purposes was disclosed. He stated that he wanted to see if there was a similarity between a nursing home operated for profit and one operated not for profit, such as an agency of Catholic charities. He added also that he wanted to see what the percentage of occupancy was at Aristocrat-Lakewood because he was concerned whether there was a need for more nursing homes.

The cost report of Whitecliff Manor, a proprietary nursing home located in Cleveland Heights, Ohio, was also requested by Krizman. Whitecliff, which is also one of the ten major Medicare providers, apparently has not opposed the release of its cost report. However, it is not in direct competition with the St. Augustine Manor as is the Aristocrat-Lakewood. Asked if release of the cost report of the plaintiff would competitively harm Aristocrat-Lakewood, he answered, "I don't believe it would."

The Blue Cross figures of the ten major providers supplied the court permit the computation of per-patient-day Medicare income for each of the ten major providers in Northeastern Ohio. It is remarkable that per-patient-day income for both St. Augustine Manor and Aristocrat-Lakewood, computed from the schedules provided, produces the same per-patient-day income of $55. This adds another competitive factor involving the two homes to those previously identified.

Upon all the relevant evidence it is concluded and determined that the plaintiff has established by a preponderance of all the evidence that it is likely that Aristocrat-Lakewood will sustain substantial harm to its competitive position with St. Augustine

Manor if the latter facility is given a copy of the Aristocrat-Lakewood annual cost report.[8]

Because of the substantial competitive harm likely to be sustained by Aristocrat-Lakewood by the release of its annual cost report to St. Augustine Manor, the test of confidentiality of the commercial and financial information contained in the cost report is fully satisfied. Therefore, it is concluded and determined that the annual cost report of Aristocrat-Lakewood requested by the executive director of St. Augustine Manor falls within the (b)(4) exemption of the Freedom of Information Act as confidential commercial and financial information.[9] As previously discussed, the Freedom of Information Act does not require that information which falls within a section 552(b) exemption be disclosed. Nevertheless, the Act does not shield the information from disclosure. In such a situation an agency may decide that disclosure should be allowed in the public interest. Although section 422.435(c) directs disclosure of a Medicare producer cost report, 20 C.F.R. §401.3(b) (2) provides, "information may [not] be disclosed to any requester" when "prohibited by any other statute." The evolution of this opinion

[8]Defendant HEW offered in evidence the Aristocrat-Lakewood report made to the State of Ohio which all recipients of Medicaid funds are required to file. However, this report does not separate income and expenses for the distinct (Medicare) part from the non-certified part of the facility. Although the government devoted a considerable amount of time in its interrogation of witnesses to an attempt to show that one could ascertain these discrete figures from the State of Ohio report, it is concluded that the evidence does not establish that this can be done. Hence Aristocrat-Lakewood's report to the State of Ohio is not deemed to be relevant to the issue presented in this action.

[9]Upon cross-examination, Mr. Laderman stated that his "techniques are not in that report;" and at another point he said that he did not write out the details of his techniques in the report. Hence it is determined that the cost report cannot qualify as a "trade secret."

therefore has progressed to the point of considering whether 18 U.S.C. §1905 is such a statute as to prohibit disclosure.

C.

Plaintiff contends that the "purported authorization" to release the provider cost report of plaintiff to third parties violates 18 U.S.C. §1905, a criminal provision. Entitled "Disclosure of Confidential Information Generally," section 1905, insofar as pertinent, provides:

> Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties . . . or . . . report . . . made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates . . . to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; . . . shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

Thus section 1905 prohibits disclosure of a "report" which concerns confidential statistical data, etc. unless the disclosure is "authorized by law." That 20 C.F.R. §422.435(c) was adopted pursuant to section 1106(a) of the Social Security Act is made clear by the first sentence of 20 C.F.R. §401.1(a), "the regulations in this part implement section 1106(a) of the Social Security Act."[10] Section 1106(a) specifically authorizes the Secretary of

[10]At oral argument, counsel for defendant HEW contended that 20 C.F.R. §422.435 was also adopted pursuant to 5 U.S.C. §301. The quoted first sentence of 20 C.F.R. §401.1(a) refutes that argument. Likewise, *Chrysler Corp. v. Schlesinger*, No. 75-159 (3rd Cir., Sept. 26, 1977) thereby becomes inapposite. *Chrysler* held that 5 U.S.C. section 301 satisfies the "authorized by law" requirement of 18 U.S.C. section 1905.

HEW to adopt regulations permitting disclosure of the information identified in section 1106(a) which would otherwise be prohibited from disclosure by that section.

It is clear enough, and it is so determined, that relaxation of the prohibitions of 18 U.S.C. section 1905 through the "authorized-by-law" language of section 1905 cannot be accomplished through the secretary's exercising of his authority to adopt regulations pursuant and relating to section 1106(a). The grant of authority to the secretary under section 1106(a) is expressly limited to adoption of regulations to relax the prohibitions of section 1106(a). Conversely, section 1106(a) does not extend authority to the secretary to adopt a regulation having the force of law that would remove the prohibitions of section 1905.

The relationship of section 1905 and exemption (b) (3) of the Freedom of Information Act requires exposition. As amended, effective September 13, 1976, 5 U.S.C. §552(b)(3) provides:

> This section does not apply to matters that are —
>
> . . . .
>
> (3) Specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

Before the adoption of this amendment as part of the Government in the Sunshine Act, Pub. L. No. 94-409, §3, 90 Stat. 1241, the (b)(3) exemption of the Freedom of Information Act provided for non-disclosure of "matters that are . . . specifically exempted from disclosure by statute."

The legislative history of amended exemption (b)(3), which is quoted in the margin,[11] shows that subsection (b)(3)(A) was enacted to overrule *Administrator, FAA v. Robertson*, 422 U.S. 255 (1972). Subsection (b)(3)(B) was added to clarify that (b)(3) is "to exempt only material required to be withheld from the public by any statute establishing particular criteria or referring to particular types of information." Fortunately, the legislative history provides present guidance for reconciling the Freedom of Information Act and the Trade Secrets Act, 18 U.S.C. §1905. Immediately following the quotation in the margin, the legislative history states:

> Similarly, the Trade Secrets Act, 18 U.S.C. §1905, which relates only to the disclosure of information where disclosure is "not authorized by law," would not permit the withholding of information otherwise required to be disclosed by the Freedom of Information Act, since the disclosure is there authorized by law. Thus, for example, if material did not come within the broad trade secrets

[11] H.W. Rep. No. 94-480, 94th Cong., 2nd Sess. 22, 23 reprinted in (1976) U.S. Code Cong. & Ad. News 2204, 2205:

> Section 5(b) amends exemption (3) of the Freedom of Information Act, 5 U.S.C. §552, to conform it to exemption (3) of the open meeting provisions of this bill and to overrule the decision of the Supreme Court in *Administrator, FAA v. Robertson*, 422 U.S. 255 (1972).
>
> *Robertson* held that exemption (3), which exempts from the coverage of the Freedom of Information Act any information "specifically exempted from disclosure by statute," includes within its ambit section 1104 of the Federal Aviation Act of 1958 (49 U.S.C. §1504), which allows the FAA Administrator to withhold from the public any FAA material when he believes that "a disclosure of such information * * * is not required in the interest of the public."
>
> * * * *
>
> Under the amendment, the provision of the Federal Aviation Act of 1958 that was the subject of *Robertson*, and which affords the FAA Administrator *cart[e] blanche* to withhold any information he pleases, would not come within exemption 3.

> exemption contained in the Freedom of Information Act, section 1905 would not justify withholding; on the other hand, if material is within the trade secrets exemption of the Freedom of Information Act and therefore subject to disclosure if the agency determines that disclosure is in the public interest, section 1905 must be considered to ascertain whether the agency is forbidden from disclosing the information. *See Charles River Park "A", Inc. v. Dept. of Housing and Urban Development*, 519 F.2d 935, 941 n.7 (D.C. Cir. 1975), and cases there cited. H.R. Rep. No. 94-460, *supra*, 2205.

Thus, the adoption by the Secretary of HEW of 20 C.F.R. §422.435(c) which authorizes the release of the Medicare cost provider report does not end the matter. As the foregoing quotation of legislative history puts it, "section 1905 must [then] be considered to ascertain whether the agency is forbidden from disclosing the information [citing *Charles River Park "A", supra*]." Section 1905 prohibits the disclosure of,

> . . . a report in which information concerns or relates to . . . confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association.

The legislative history indicates that "if material did not come within the broad trade secrets exemption contained in the Freedom of Information Act, section 1905 would not justify withholding." This means that section 1905's shield against disclosure cannot exceed the breadth of the section 552(b) (4) exemption. Conversely, it is concluded that the confidentiality shield of section 1905 is as broad as the confidentiality shield of section 552(b) (4). Accordingly, once it is determined that "confidentiality" has been established under the test set forth in *Charles River Park "A", supra*, the conclusion necessarily follows that the "language of section 1905 encompasses the information sought here." *Charles River Park "A", supra*, at 943. It has previously been concluded and determined that the

Aristocrat — Lakewood has established by a preponderance of the evidence that the disclosure of the Artistocrat — Lakewood 1975-76 Medicare cost provider report to St. Augustine Manor, its closest competitor, will cause substantial competitive harm to the plaintiff. Therefore, section 1905 bars the secretary from releasing the Aristocrat — Lakewood cost provider report to either the executive director of St. Augustine Manor, to St. Augustine Manor, or to any other person. Release of the information into the public domain would be likely to result in the information reaching St. Augustine Manor.

While this court does not strike down Regulation 422.435 as was done in *Parkridge Hospital, supra*, it does conclude that it would violate section 1905 if the secretary were to be permitted to apply Regulation 422.435(c) in the circumstances of this case. Consequently, to release the plaintiff's Medicare cost provider report to St. Augustine Manor, its director, or to any other person, would constitute an invalid application of the regulation and under section 706(2) (A) of Title 5 U.S.C., a release would be both an "abuse of discretion" and "not in accordance with law."

Upon the foregoing grounds and for the foregoing reasons, the preliminary injunction previously granted the plaintiff against release of its cost provider report is made permanent.

IT IS SO ORDERED.

/s/ WILLIAM K. THOMAS
United States District Judge

Unreported Decisions

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE DIPLOMAT LAKEWOOD, INC. d.b.a. THE ARISTOCRAT NURSING HOME – LAKEWOOD,

Plaintiff,

vs.

BLUE CROSS OF NORTHEAST OHIO,

Defendant.

Civil Action

Number C 77-718

The Court having filed its memorandum and order on November 25, 1977, therefore, pursuant to Rule 58, Federal Rules of Civil Procedure,

IT IS ORDERED that the preliminary injunction previously granted the plaintiff against release of its cost provider report is made permanent.

/s/ WILLIAM K. THOMAS
William K. Thomas
United States District Judge

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE DIPLOMAT LAKEWOOD, INC. dba THE ARISTOCRAT NURSING HOME-LAKEWOOD,

Plaintiff,

vs.

BLUE CROSS OF NORTHEAST OHIO,

Defendant,

and

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,
Intervenor.

CASE NO. 77-718

Judge Thomas

Notice is hereby given that Department of Health, Education and Welfare, an agency of the United States of America, intervenor in the above named case hereby appeals to the United States Court of Appeals for the Sixth Circuit from the Memorandum and Order making permanent the preliminary injunction previously granted to plaintiff entered in this action

on November 25, 1977, and from the Order to the same effect entered in this action on November 29, 1977.

WILLIAM D. BEYER
UNITED STATES ATTORNEY

By /s/ THOMAS H. BAUGHMAN
Assistant U.S. Attorney
400 U. S. Court House
Cleveland, Ohio 44114
Telephone: 216/522-4321

CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Appeal was mailed to Morton B. Icove, attorney for plaintiff, 322 Leader Building, Cleveland, Ohio 44114, this 24th day of January, 1978.

THOMAS H. BAUGHMAN
Assistant U. S. Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PSYCHIATRIC INSTITUTE OF WASHINGTON, D.C., INC.,
Plaintiff,

v.

GROUP HOSPITALIZATION, INC.,
and
JOSEPH A. CALIFANO, JR.,
Defendants.

Civil Action No. 78-220

ORDER

This matter comes before the court at a consolidated hearing on the merits and on plaintiff's motion for a preliminary injunction. This court had granted plaintiff a Temporary Restraining Order in this case on February 10, 1978. In this reverse F.O.I.A. case, the Department of Health, Education and Welfare (hereinafter H.E.W.) wishes to release the Provider Cost Reports which plaintiff is required to file in order to receive reimbursement for services rendered to patients eligible for Medicare. 20 C.F.R. §405.406(b). The request for the release of these reports was made by the Communications Workers of America, a union which represents some of plaintiff's employees. Plaintiff contends that the information contained on these Provider Cost Reports is confidential corporate financial information and is therefore exempt from disclosure under exemption (b)(4) of the F.O.I.A. 5 U.S.C. §552(b)(4). Plaintiff further contends that H.E.W.'s attempt to release this information voluntarily pursuant to its regulation 20 C.F.R. §422.435 is an abuse of discretion since this information is covered by 18 U.S.C. §1905, which makes it a crime for a

government employee to release information of this type without the authorization of law. H.E.W. contends that the information at issue is not confidential, and that even if it is, H.E.W. contends that it may release it voluntarily. For the reasons stated below, this court finds that the information contained on the Provider Cost Reports is exempt from disclosure due to its confidential nature, and that any effort to release this information voluntarily is an abuse of discretion.

I. *Confidentiality*

Exemption (b)(4) of the F.O.I.A. states:

> (b) This section does not apply to matters that are — *
>
> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential . . . .

There is no dispute in this case that the information in question is financial information which the government has obtained from the plaintiff. The only question regarding the (b)(4) exemption is whether this information is confidential. In this Circuit, the test for determining the confidentiality of such financial information was enunciated in *National Parks and Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), where the court, after an examination of the legislative history of the (b)(4) exemption, stated:

> [C]ommercial or financial matter is "confidential" for the purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

Id. at 770. The court in *National Parks* went on to state that where the government had required the filing of such information the first of the two considerations stated above is irrelevant. *Id.* Therefore, the question of confidentiality of the information in this case boils down to the assessment of whether the disclosure of this information would substantially impair plaintiff's competitive position.

The information requested in this case is of a somewhat different nature than that requested in most other cases dealing with the (b)(4) exemption. Whereas the usual exemption 4 case finds a competitor requesting the disclosure of allegedly confidential financial information, in this case it is the union representing plaintiff's employees that is requesting the information. Therefore, rather than resorting solely to an analysis of business competition, this court must examine the field of labor law to determine if Congress or the courts have made any decisions regarding the exchange of information between labor and management. If such a decision does exist, it cannot be said that Congress meant to overrule that decision *sub silentio* via the enactment of a law in a field normally unrelated to labor disputes. *See Southwest Motor Freight, Inc. v. N.L.R.B.*, 411 F. Supp. 1019, 1020-21 (E.D. Tenn. 1976) (despite presumption in F.O.I.A. in favor of disclosure, N.L.R.B.'s failure to release certain information pertinent to an impending hearing was not grounds for enjoining that hearing in light of the well-established rule prohibiting such district court action).

It is a fundamental tenet of national labor relations law that management does not have to provide labor with cost and profit figures so long as the employer has met its duty to bargain in good faith. The leading case in this area is *National Labor Relations Board v. Truitt Manufacturing Co.*, 351 U.S. 149, 76 S.Ct. 753 (1956). In *Truitt*, the employer had told the union during collective bargaining that management could not afford any wage increase due to financial considerations. When the union asked for proof of this financial situation, the employer refused to provide any documentation, indicating that it felt

that the union had no legal right to such information. The N.L.R.B. found that where the employer had made its ability to pay an issue in the negotiations and had then refused to provide the union with background information regarding this inability, this represented a refusal to bargain in good faith and was, therefore, an unfair labor practice under 29 U.S.C. §§158(a)(5), 158(d). The Supreme Court agreed with this assessment:

> Good faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy.
>
> • • •
>
> We do not hold, however, that in every case in which economic inability is raised as an argument against increased wages it automatically follows that the employees are entitled to substantiating evidence. Each case must turn upon its particular facts. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met.

Id. at 152-54, 76 S.Ct. at 755-56. It is a generally accepted premise of labor law that, pursuant to the *Truitt* decision, labor is entitled to detailed cost and profit information from management only when management has failed to bargain in good faith and where the information is relevant to the negotiations *San Diego Newspaper Guild v. N.L.R.B.*, 548 F.2d 963 (9th Cir. 1977); *Shell Oil Co. v. N.L.R.B.*, 457 F.2d 615 (9th Cir. 1972); *Kayser-Roth Hosiery Co. v. N.L.R.B.*, 447 F.2d 396 (6th Cir. 1971).

In light of this national labor policy, it is not difficult to see how plaintiff's "competitive position" will be substantially prejudiced. Plaintiff will certainly be in a less competitive position vis-a-vis the union if this exchange of information occurs. The good faith bargaining requirement which is the basis of

the *Truitt* line of cases requires bargaining, not agreement. Congress' policy, as amplified by the courts, is to permit hard bargaining so long as this good faith requirement is met. Accordingly, the union is entitled to cost and profit information only in a limited set of circumstances. These circumstances do not exist here. Giving the union the information it seeks in this situation would, therefore, substantially alter the balance of bargaining positions which Congress has dictated. Not only would the disclosure of this information substantially prejudice plaintiff's position in its negotiations with the union, it would also put plaintiff at a disadvantage in competing with other health care institutions in this area. The disclosure of this information could result in higher labor costs to plaintiff, and, therefore, higher costs to plaintiff's patients. In light of these considerations, this court finds that all of the information contained on the Provider Cost Reports is confidential and, therefore, exempt from disclosure under exemption (b)(4) of the F.O.I.A.

II. *Voluntary Disclosure and Abuse of Discretion*

Defendants contend that even if the information is exempt from disclosure, 20 C.F.R. §422.435(c) allows H.E.W. to release this information voluntarily. Section 422.435(c) states in pertinent part:

> The following shall be made available to the public under the conditions specified:
>
> • • •
>
> (c) Upon request in writing, cost reports submitted by providers of services ... to enable the Secretary to determine amounts due such providers

Plaintiff contends that this regulation is an abuse of discretion on the part of H.E.W. since it would allow the release of in-

formation covered by 18 U.S.C. §1905, which states in pertinent part:

> Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason or any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the . . . amount or source of any income, profits, losses or expenditures or any person, firm, partnership, corporation or association . . . shall be fined not more than $1000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

Defendant claims that this provision is inapplicable to F.O.I.A. suits involving Provider Cost Reports Under the Medicare system.

The United States Court of Appeals for the District of Columbia Circuit has had occasion to analyze the interplay between section 1905 and exemption (b)(4). In *Charles River Park "A", Inc. v. H.U.D.*, 519 F.2d 935 (D.C. Cir. 1975), the court confronted a situation in which H.U.D. advanced the same argument for voluntary release of confidential information which H.E.W. is advancing in this suit. In response to such an argument, the court stated:

> [W]e agree . . . that if the disclosure of the information involved here would constitute the violation of a criminal statute, it would be an abuse of discretion for an agency to ignore such a mandate and release the information.
>
> HUD argues that section 1905 has no applicability here because HUD rules promulgated pursuant to the FOIA permit the disclosure of the information at issue here and that therefore disclosure is "authorized by law." We disagree. If we assume that this information falls within the fourth exemption, then the FOIA does not apply to it because the language clearly provides that the Act "does not apply to matters" that fall within an exception. 5 U.S.C. §552(b). As indicated earlier the legislative history suggests that the FOIA is neutral with respect to exempt information; it neither authorizes or prohibits the disclosure of such information.

Id. at 942. The court went on to discuss the possibility of releasing such information in the absence of a statutory mandate:

> If the FOIA is inapplicable, then the court must decide whether the agency's release of such information would be an abuse of discretion. It must consider 18 U.S.C. §1905 and determine whether the information sought falls within the specific prohibitions therein contained. If it does, it would be an abuse of discretion for HUD to release the information.

Id. at 943.

This court's finding that the information involved in this case is confidential indicates that the F.O.I.A. is inapplicable. This court must, therefore, determine whether the information sought is covered by section 1905. Defendants have argued that H.E.W. is authorized to release this information by 42 U.S.C. §1302. However, section 1302 is simply Congress' grant of general rulemaking and regulatory powers to the Secretary to carry out the purposes of the Social Security. This general power to make any regulations necessary for the efficient administration of the Act in no way implies that the Secretary may ignore other statutes in making these regulations. 42 U.S.C. §1302 in no way insulates the Secretary from the requirement of 18 U.S.C. §1905. Examination of the information involved in this case reveals that it is clearly covered by section 1905. The cost reports, filed pursuant to a government requirement, state the "source of income, profits, losses or expenditures" as incurred by plaintiff corporation. Since the F.O.I.A. is inapplicable to this

information via exemption (b)(4), since the information is of the type covered by section 1905, and since there is no statutory authorization for H.E.W.'s release of such information, the *Charles River Park "A"* decision indicates that H.E.W. would abuse its discretion if the information were disclosed.

The government has gone on record as disagreeing with the Circuit Court's holding in *Charles River Park "A"*. The government has urged this court to adopt the position announced by the Third Circuit in *Chrysler Corp. v. Schlesinger*, 565 F.2d 1172 (3d Cir. 1977), *cert. granted* 46 U.S.L.W. 3552 (March 7, 1978), which specifically disapproved of the *Charles River Park "A"* decision. However, this court is bound by the law of this case. The Circuit Court's decision in *Charles River Park "A"* is applied to the case at hand, and this court shall abide by it.

Therefore, upon consideration of the cross-motions for summary judgment, the memoranda in support thereof and in opposition thereto, oral argument thereon, and for the reasons stated above, it is, by this court, this 30th day of March, 1978,

ORDERED, ADJUDGED and DECREED that defendants' motion for summary judgment be, and the same hereby is, denied; and it is further

ORDERED, ADJUDGED and DECREED that plaintiff's motion for summary judgment be, and the same hereby is, granted; and it is further

ORDERED, ADJUDGED and DECREED that judgment be, and the same hereby is, entered in favor of the plaintiff in this matter.

/s/ (name is illegible)
UNITED STATES DISTRICT JUDGE

FILED
MARCH 30, 1978
JAMES F. DAVEY, CLERK

Supreme Court, U.S.
FILED
MAR 21 1980
MICHAEL RODAK, JR., CLERK

No. 79-1161

In the Supreme Court of the United States

OCTOBER TERM, 1979

SAINT JOSEPH'S HOSPITAL HEALTH CENTER,
PETITIONER

v.

BLUE CROSS OF CENTRAL NEW YORK, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-2 to A-3) is not reported. The opinion of the district court (Pet. App. A-6 to A-33) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 1979. The petition for a writ of certiorari was filed on January 28, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the public disclosure of cost reports submitted to the Department of Health, Education, and Welfare pursuant to agency regulations by certified Medicare providers is "authorized by law" within the meaning of the Trade Secrets Act, 18 U.S.C. 1905.

STATEMENT

Petitioner St. Joseph's Hospital Health Center, which is a certified provider of services under the Medicare Act (Title XVIII of the Social Security Act, 42 U.S.C. 1395 *et seq.*), brought this suit in the United States District Court for the Northern District of New York to enjoin the Secretary of Health, Education, and Welfare and the Secretary's fiscal intermediary, Blue Cross of Central New York, Inc., from disclosing the hospital's 1978 cost reports to a labor union.[1] The union had requested the reports pursuant to an HEW disclosure regulation, 20 C.F.R. 422.435.[2] Petitioner claimed that the proposed disclosure of its cost reports was prohibited by the Trade Secrets Act, 18 U.S.C. 1905.[3] The district court disagreed, holding

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[1]Cost reports containing detailed financial information must be filed with fiscal intermediaries by hospitals participating in the Medicare program in order to receive reimbursement for services rendered to program beneficiaries. 42 U.S.C. 1395g; 20 C.F.R. 405.453.

[2]20 C.F.R. 422.435 provides:

> The following shall be made available to the public under the conditions specified:
>
> * * * * *
>
> (c) Upon request in writing, cost reports submitted by providers of services pursuant to section 1815 of the Act [42 U.S.C. 1395g] to enable the Secretary to determine amounts due such providers.

[3]18 U.S.C. 1905, which is reproduced at Pet. App. A-36, essentially provides criminal sanctions against government employees who disclose to any extent "not authorized by law" any "confidential statistical data, amount or source of income, profits, losses or expenditures of any person * * * [or] corporation * * *."

that disclosures pursuant to the regulation are "authorized by law" within the meaning of Section 1905 (Pet. App. A-6 to A-33). The court of appeals affirmed (Pet. App. A-2 to A-3).

ARGUMENT

The decision of the court of appeals is correct and is fully consistent with the only other court of appeals decision that addresses the issue, *St. Mary's Hospital, Inc.* v. *Harris*, 604 F. 2d 407 (5th Cir. 1979). Review by this Court is therefore unwarranted.

1. The Trade Secrets Act bars only disclosures "not authorized by law." 18 U.S.C. 1905. *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 294-309 (1979), holds that a disclosure regulation has the force and effect of "law" within the meaning of the Act where: (i) the regulation is a substantive rule; (ii) it is promulgated in compliance with applicable procedural requirements; and (iii) it is promulgated pursuant to legislative authority delegated by Congress.

20 C.F.R. 422.435 satisfies these criteria. The regulation is "substantive" because it governs "the public's right to information * * * and the confidentiality rights of those who submit information." *Chrysler Corp.* v. *Brown*, *supra*, 441 U.S. at 303. The regulation was promulgated in accordance with the notice-and-comment requirements of the Administrative Procedure Act, 5 U.S.C. 553, and the Secretary set forth his reasons for issuing the regulations after considering these comments. See 40 Fed. Reg. 17849-17852, 27648-27651 (1975). Finally, the regulation was promulgated pursuant to legislative

authority delegated to the Secretary in 42 U.S.C. 1306(a), which provides (Pet. App. A-36 to A-37; emphasis added):

> (a) No disclosure * * * of any file, record, report or other paper, or any information, obtained at any time by the Secretary of Health, Education, and Welfare * * * or by any officer or employee of the Department of Health, Education, and Welfare * * * in the course of discharging their respective duties under this [Act] * * * shall be made *except as the Secretary of Health, Education, and Welfare * * * may by regulations prescribe* * * *.

Although generally protective of the confidentiality of information submitted to HEW, this statute plainly grants the Secretary discretion to promulgate regulations authorizing public disclosure.[4] Accordingly, the disclosure of the cost reports governed by the regulation is not barred by the Trade Secrets Act because, as the court of appeals held, their disclosure is "authorized by law" within the meaning of that statute (Pet. App. A-2 to A-3).

2. Petitioner contends (Pet. 5) that this Court should grant certiorari because the court of appeals' decision conflicts with various district court decisions that are currently on appeal. Petitioner asserts (Pet. 9-10) that a conflict in the circuits is likely to arise and that its resolution cannot wait due to "time constraints." The short answer to this contention is that there will be time enough for this Court to review the issue if in fact a conflict ever develops. There is, moreover, a strong likelihood that no conflict will develop because all but

[4]As the Fifth Circuit noted in *St. Mary's Hospital, Inc.* v. *Harris*, *supra*, this interpretation of the statute is supported by legislative history and judicial construction. 604 F. 2d at 410 nn.8, 9.

three of the district court decisions cited by petitioner (Pet. 6-9, 11 n.2)[5] were decided prior to *Chrysler* and turned on the erroneous assumptions that the Freedom of Information Act prohibits the disclosure of information that falls within Exemption 4 (5 U.S.C. 552(b)(4)) and/or that agency regulations cannot afford "authori[zation] by law" for the disclosure of information within the ambit of the Trade Secrets Act. Those decisions cannot stand in light of *Chrysler*. Furthermore, the three post-*Chrysler* cases cited by petitioner (Pet. 8-9) will not reach the courts of appeals without further district court proceedings, because each involved a remand for further fact findings by the Secretary.[6] Therefore, review by this Court on the ground of divergent district court decisions would be premature.

[5]The three decisions are *St. Anthony's Medical Center, Inc.* v. *Califano*, No. 79-171-C (S. D. Ind. Oct. 19, 1979); *Hospital Affiliates International, Inc.* v. *Califano*, No. 77-3088 (N.D. Ill. Jan. 28, 1979); and *Washington Hospital Center* v. *Mutual of Omaha*, No. 78-2485 (D.D.C. June 25, 1979).

As petitioner recognizes (Pet. 11 n.1), a number of district court decisions both before and after *Chrysler* are in accord with the Second Circuit's decision in this case.

[6]For this reason the Secretary has moved to dismiss her notice of appeal to the Seventh Circuit filed in *St. Anthony's Medical Center, Inc.* v. *Califano, supra* (No. 79-2554), and has not taken appeals in *Washington Hospital Center* v. *Mutual of Omaha, supra*, or *Hospital Affiliates International, Inc.* v. *Califano, supra*.

3. Petitioner's additional contention (Pet. 10-13) that the court of appeals' decision should be reviewed because the Secretary's disclosure regulation is "arbitrary and capricious" and poses a serious threat to the financial stability of the hospital industry is without merit. In the notice-and-comment proceedings held prior to the promulgation of the regulation, hospital spokesmen asserted that the disclosure of cost reports would cause irreparable harm to the industry, but the Secretary found that the industry had offered no evidence in support of that assertion. After weighing these unsupported claims against the public interest in the disclosure of Medicare cost information, the Secretary concluded (40 Fed. Reg. 27649 (1975)):

> The reimbursement of provider costs, the amount of which is determined through analysis of cost report data, is a public business, and, as such, the records involved in the process of implementing this part of the program should be public records. Providers participating in Medicare and submitting such reports received a total of $6,821,463,000 for fiscal year 1973. An expenditure of public funds of this magnitude carries with it a corollary that the public assure itself the funds are properly paid.

Since the Secretary received the industry's comments and made a rational judgment as to the competing interests involved, the regulation is not "arbitrary or capricious" and does not constitute an "abuse of discretion." 5 U.S.C. 706(2)(C). See *St. Mary's Hospital, Inc.* v. *Harris*, *supra*, 604 F. 2d at 410.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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MARCH 1980

DOJ-1980-03